TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 170 · 79.

THE FRANKLIN SUGAR REFINING COMPANY, APPELLANT,

vs.

THE STEAMSHIP "SILVIA," HER ENGINES, &c., THE RED CROSS LINE, CLAIMANT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FILED NOVEMBER 4, 1896.
CERTIORARI AND RETURN FILED MARCH 8, 1897.

(16,080.)

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., MARCH 29, 1897.

1 United States District Court, Southern District of New York.

FRANKLIN SUGAR REFINING COMPANY, Libellant & Appellant,
vs.
THE STEAMSHIP "SILVIA," HER ENGINES, ETC.; RED CROSS LINE, Claimant & Appellee.

Statement.

1894.
July 14. Libel filed, no process issued.
Oct. 9. Answer filed.
Nov. 13. Cause tried before Hon. Addison Brown, U. S. district judge.
" 23. Opinion rendered dismissing libel without costs.
Dec. 1. Final decree entered.
" 11. Notice of appeal filed.

2 To the Honorable Addison Brown, judge of the district court of the United States for the southern district of New York:

The libel of the Franklin Sugar Refining Company against the steamship *Silvia*, her engines, &c., and against all persons claiming any interest therein, in a cause of contract, civil and maritime, alleges as follows:

First. The libellant was at the times hereinafter mentioned, and is now, a corporation duly incorporated and existing under the laws of the Commonwealth of Pennsylvania.

Second. On or about the 15th day of February, 1894, there was shipped on board said steamship, then lying in the port of Matanzas and bound for Philadelphia, by Dubois & Co., by order of Messrs. Hidalgo & Co., of Havana, in good order and well conditioned, 13,227 bags of centrifugal sugar weighing net 4,267,878 pounds, marked H 1/13227, for which the master of said vessel executed and delivered a bill of lading, to which the libellant begs leave to refer and make a part of this its libel, whereby, among other things, it was agreed that said sugar was to be delivered in like good order and condition at the port of Philadelphia, the dangers of the seas only excepted, unto the order of the American Sugar Refining Company or to their assigns, on payment of an agreed freight.

Third. Thereafter said vessel with said sugar on board sailed from said port of Matanzas for the port of Philadelphia, where she arrived on or about February 21st, 1894, and there discharged her cargo; but she did not deliver said sugar in the condition in which it was received, but in bad order and condition, 1,388 bags being damaged and 20 entirely empty.

Fourth. Said damage was caused by the failure of the owners of said vessel to exercise due diligence to make said vessel in
3 all respects seaworthy and to the failure of said owners and those in charge of said vessel to take proper care of the cargo, especially in that they did not properly secure the side lights of said vessel and allowed said vessel to go to sea with one of her side lights improperly closed or with no proper shutter fitted thereto,

and after the said glass had been broken, instead of using due diligence in repairing said side light, allowed the same to admit sea water to the damage of said cargo, and in other faults which the libellant will show at the trial of this cause.

Fifth. The libellant had purchased said sugar relying upon the statement of the said bill of lading that the sugar had been put on board in good order and condition. The said bill of lading was duly assigned to the libellant, which became the owner of said cargo and entitled to bring this suit.

Sixth. By reason of the premises the libellant has suffered damage in the sum of $4,805.66, no part of which sum has been paid, although payment thereof has been duly demanded.

Seventh. Said steamship *Silvia* is now within this district and within the jurisdiction of this court.

Eighth. All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this honorable court.

Wherefore the libellant prays that process in due form may issue against said steamship *Silvia*, her engines, &c., and that all persons claiming any interest therein may be cited to appear and answer the matters aforesaid, and that said steamship may be condemned and sold to satisfy the claim of the libellant, with interest and costs.

THE FRANKLIN SUGAR REFINING CO.,
P'r GEORGE H. FRAZIER, *Treasurer.*

4 CITY AND COUNTY OF PHILADELPHIA, } ss:
State of Pennsylvania, }

George H. Frazier, being duly sworn, says that he is treasurer of the libellant herein, which is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania; that he has read the foregoing libel and the same is true to the best of his knowledge; that deponent's knowledge is derived from reports made to him in reference to the damage to the cargo as set forth herein.

GEORGE H. FRAZIER.

Sworn to before me this 10th day of July, 1894.

JOHN RODGERS, [SEAL.]
Notary Public.

WING, SHOUDY & PUTNAM,
Proctors for Libellant.

(Endorsed:) Libel. Filed July 14, 1894.

5 To the Honorable Addison Brown, United States district judge for the southern district of New York:

The answer of the Red Cross Line, owner and claimant of the steamship *Silvia*, to the libel of the Franklin Sugar Refining Company against said steamship, her engines, etc., and against all persons claiming any interest therein, in a cause of contract, civil and maritime, alleges as follows:

First. It has no knowledge of the matters contained in the first article of the libel, and requires proof thereof.

Second. It admits that on or about the 15th of February, 1894, there was shipped on board said steamship, then lying in the port of Matanzas, and bound for Philadelphia, by Du Bois & Company, by order of Hidalgo & Company, of Havana, a full and complete cargo, consisting of sugar in bags, the number, marks, weight, contents, order and condition of the said sugar being unknown to the claimant, and that a bill of lading was issued therefor, whereby, amongst other things, it was agreed that the said sugar should be delivered at New York upon the order of the American Sugar Refining Company upon the terms and conditions mentioned in a charter-party between the Red Cross line, as owners of the *Silvia*, and J. H. Winchester & Company, agents for charterer, said charter-party being dated January 31, 1894; the other allegations in the second article of the libel it denies.

Third. It admits that thereafter the vessel sailed from Matanzas for Philadelphia, where she arrived about the 26th of February, and there discharged her cargo, and that a portion of the said cargo was found to be damaged by sea water, but it requires proof of the character and extent of the said damage, as to which it has no knowledge; and, except as herein admitted, it denies any
6 knowledge or information sufficient to form a belief in relation to the matters contained in the third article of the libel.

Fourth. It denies the matters alleged in the fourth article of the libel.

Fifth. It has no knowledge of the matters alleged in the fifth article of the libel, and requires proof thereof.

Sixth. It has no knowledge of the matters contained in the sixth article of the libel, and requires proof thereof.

Seventh. It admits the matters contained in the seventh article of the libel.

Eighth. It denies the matters alleged in the eighth article of the libel, except the jurisdiction, which it admits.

Ninth. Further answering said libel, the claimant alleges:

The charter-party referred to in the bill of lading contained, amongst others, the following exception:

"The act of God, adverse winds, * * * errors of navigation, and all other dangers and accidents of the seas, rivers and navigation, of whatever nature and kind soever, during the said voyage, always excepted."

That the owner of said vessel exercised all due diligence to make the said vessel in all respects seaworthy, and properly manned, equipped and supplied for the voyage, and that the said damage was caused and occasioned by adverse winds and dangers and accidents of the seas, rivers, and navigation, within the above-quoted clauses of the charter-party; and the claimant further claims the exemptions from responsibility afforded by the provisions of an act of Congress, entitled "An act relating to the navigation of vessels, bills of lading, &c.," approved February 13, 1893.

7 Tenth. Wherefore the claimant prays that the said libel be dismissed with costs.

CONVERS & KIRLIN,
Proctors for Claimant.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

L. B. Stoddart, being duly sworn, says that he is a member of the firm of Bowring & Archibald, agents of the claimant, and that the foregoing libel is true according to his information and belief, derived from statements made by the officers and members of the crew of said steamship. He further says that the claimant is a foreign corporation, and that none of its officers reside or are within a hundred miles of the place of trial; wherefore deponent makes this verification.

LAWRENCE BOWRING STODDART.

Sworn to before me this 8th day of October, 1894.

FREDERICK GREEN,
[SEAL.] *Notary Public, N. Y. Co.*

(Endorsed:) Answer. Filed October 9, 1894.

8 United States District Court, Southern District of New York.

FRANKLIN SUGAR REFINING COMPANY *vs.* THE STEAMER "SILVIA." } Before Hon. Addison Brown, Judge.

NEW YORK, *Nov. 13th*, 1894.

Appearances.

Messrs. Wing, Shoudy & Putnam (Mr. Burlingham), for the libellant.

Messrs. Convers & Kirlin (Mr. Kirlin), for the claimant.

Mr. Burlingham states the facts of the libel.

Mr. Kirlin the facts of the answer.

It is admitted by the counsel for the claimant that the Franklin Sugar Refining Company is a Pennsylvania corporation.

Counsel for claimant offers in evidence depositions of Joseph Clark, captain; Joseph Nicholson, chief officer; Henry Shortell, carpenter; William Tuthill, second engineer, and the exhibits annexed to depositions.

Mr. Burlingham objects to the admission of protest.

The COURT: I accept the protest not as any evidence of the truth of the facts contained in it, but as proof of the master's compliance with the ordinary marine practice concerning what his intention was in regard to the loss.

9 *Depositions on Behalf of the Claimant, Taken Before a Notary Public, by Consent, November 1st, 1894.*

JOSEPH CLARK, being duly sworn, testifies:

Examined by Mr. KIRLIN:

I am master of the steamship *Silvia*, and was in command of her on the voyage from Matanzas, Cuba, to Philadelphia, in the month of February, 1894. I have been a master mariner since 1878, and have been in command of the *Silvia* since December last.

The *Silvia* is an iron steamship of 1,104 tons net register, built in Newcastle about 1884. She is built of iron, classed in Lloyds 100 A 1—a first-class ship in every respect. Her length is 255 feet; beam 34 feet; depth of hold, about 28 feet.

Q. Was the steamer under charter on the voyage from Cuba to Philadelphia?

A. Yes.

Q. That was the voyage on which this damage arose?

A. Yes.

Q. (Handing witness copy of the charter-party.) Do you identify that as a copy of the charter-party?

A. Yes, so far as I know, that is a copy.

Charter-party marked for identification Claimant's Exhibit A, Nov. 1st, 1894.

Q. Was a cargo of sugar taken aboard, pursuant to that charter-party?

A. Yes.

Q. Did you sign a bill of lading for it?

A. Yes.

Q. (Handing witness a copy of the bill of lading.) Is that a copy of the bill of lading?

A. Yes, to the best of my knowledge.

Q. Is that your signature?

A. Yes.

Bill of lading marked for identification Claimant's Exhibit B, November 1st, 1894.

Q. When did you begin to load the cargo?

A. About the 12th, I should say.

Q. Do you recollect the date when you finished?

A. I think we were 4 days loading.

10 Q. Have you your log with you?

A. No.

Q. Do you know where it is?

A. I don't.

Q. Can you state from recollection the date on which you sailed on the voyage?

A. About the 16th, as near as I can remember.

Q. What time of day?
A. Early morning.
Q. When did you complete loading the cargo?
A. The evening before.
Q. About what time?
A. About six o'clock.
Q. How had the cargo been laden at Matanzas?
A. From lighters.
Q. Do you recollect along which side of the steamer the lighters came in bringing the cargo?
A. Principally on the port side.
Q. Were any lighters on the starboard side abreast of the port light which was broken on the voyage?
A. Not that I know of.
Q. Were there any lighters on that side in that neighborhood on the day before sailing?
A. Not that I am aware of. I am under the impression that all the cargo was taken in from the port side.
Q. What time did you come to the ship on the afternoon before you sailed?
A. About six o'clock—about coming dusk.
Q. How did you come out from the shore?
A. In a rowboat.
Q. And when you got to the steamer did you go immediately aboard?
A. I don't know—did I go right aboard, or did I look around then. I think I just took a survey of the ship—to see how she is trimmed and for her marks; but whether I came aboard first or whether I took a survey I cannot say.
Q. What time did you do that?
A. Just before dark.
Q. Did you look at her marks then?
A. I think she was a matter of about five or six inches by the stern, and she was about twenty feet forward and about twenty feet seven or eight aft, as near as I can recollect.
Q. Did you observe the ports as you were moving around the ship?
A. Yes.
11 Q. Were any open at that time?
A. None open at that time, except in the forecastle.
Q. None of the ports in the holds nor in the steerage were open?
A. Of course the ports in the forecastle were open.
Q. How many of those are there?
A. Three in each side, I think.
Q. How far above the line of the water was the port in which the glass was broken on the voyage?
A. I should say between 8 and 9 feet, as near as I know, when the ship was deep laden.
Q. How many ports had this ship when she was constructed? What was the arrangement of them?
A. Right along the 'tween-decks from stem to stern. And now since

she has been engaged in this trade there are more ports put in her aft than originally.

Q. At the time of this voyage what ports were there?

A. We have put two ports in since.

Q. Limited to forward of the engine-room?

A. As far as I know; there is two in the forehold, the 'tween-decks of No. 2, and there is two or three on each side in the steerage.

Q. Where is the steerage?

A. In the 'tween-decks of No. 1.

Q. That is the 'tween-decks of No. 1 has been converted into a steerage?

A. Yes.

Q. And the forward one, that is the forecastle?

A. Yes.

Q. Has the vessel iron 'tween-decks or wooden?

A. Iron.

Q. And does that form the floor of the steerage?

A. Yes, covered with board.

Q. What is the size of these ports?

A. Eight inches.

Q. Is that diameter?

A. Yes.

Q. They are round, I suppose?

A. Yes.

Q. How is the glass put in?

A. Placed in a brass frame and fastened with a brass band on the outside of the glass, and which screws into the frame from the outside. The glass is put into the frame from the outside, and
12 then the brass band is screwed on the outside of that. Then the glass is supported in the frame on both sides by brass. It is the same as though you put a window glass in a frame from the outside, and put the putty on the outside of the glass.

Q. Does this brass frame swing on a hinge?

A. Yes.

Q. Which way does it swing, in or out?

A. In.

Q. Is there any other means of closing these portholes besides that glass port?

A. Yes.

Q. What is it?

A. What we call a dummie, inside of that.

Q. The dummie is made of what? Describe it.

A. The dummie is an iron casting, which shuts with a hinge on the inside of the glass and protects it from the inside.

Q. How many steamers have you been in besides the *Silvia*?

A. I have been in 5 steamers.

Objected to.

Q. How many of those steamers had ports opening into the holds?

Objected to.

A. I know the *Miranda* had, and the *Avolyn* had not. What the others had I would not say.

Q. So far as your experience extends, has it been customary to close the shutters or to leave the shutters open?

Objected to.

A. When it is in a hold with cargo, we usually shut them. If it is not, we don't. We consider the glass quite sufficient to keep out water.

Q. Why do you close the iron shutters when you have cargo?

Objected to.

A. To prevent the glass breaking from the cargo on the inside. To prevent any cargo from striking against the glass.

13 Q. Are the glasses deemed sufficiently strong to resist the action of the sea?

Objected to.

A. Yes, we have ports in that vessel now that have no shutters to them.

Q. Which vessel?

A. The *Silvia.*

Mr. BURLINGHAM: I move to strike out the last part of the last answer as irresponsive.

Q. Has it been the practice of the *Silvia* ever to close the shutters except when cargo is in the hold?

A. No; other times they are always open.

Q. Are these ports any different from the ports in the forecastle or in the saloon of steamships generally?

A. No, except they are smaller than some.

Q. Is it usual to close the shutters inside of the ports in the forecastle or in the saloon?

A. Most of them don't have shutters.

Objected to.

Q. How thick are these glasses on the *Silvia?*

A. About half an inch, I should think.

Q. Is that the usual thickness for glass of ports?

A. Yes, fully.

Q. Now on this voyage from Matanzas to Philadelphia, were the shutters inside of any of the ports closed?

A. No, I think not.

Q. Was there any damage, except to the one port in the steerage?

A. No.

Q. When was that broken, if you know?

A. We don't know when it was broken. We only know by the result.

Q. When was it found to be broken?

A. The first indication we had of it the engineer reported water coming through into the engine-room. Then of course a search was made all round to see where the damage could possibly come from, and this glass was discovered to be broken.

Q. Where was that glass?

A. In the fore part of the steerage. The forward glass on
14 the starboard side of the steerage was found to be broken, and the steerage filled with water.

Q. Did you go below yourself?

A. Yes, after a time.

Q. Did you see the glass of the port, or had it been shut up?

A. Of course, as soon as it was discovered the carpenter went down and closed up the dummy.

Q. Did that keep the water out?

A. Yes, with the exception of just a slight weep—not to do any damage of any kind.

Q. How much would come in through weeping?

A. Wouldn't be a bucketful in a watch.

Q. Did you have scuppers in the 'tween-decks—the steerage?

A. Yes, all the 'tween-decks had scuppers.

Q. When was this discovered?

A. On the day we left Matanzas.

Q. About what time in the day?

A. Early fore part of the afternoon.

Q. You left in the early morning?

A. Yes.

Q. What kind of weather did you strike after you got out?

A. We had the tail end of a strong breeze, a norther.

Q. How much sea was there?

A. Quite a nasty short choppy sea.

Q. How was it making with reference to your course?

A. About right ahead.

Q. Did you see any wreckage?

A. Not that I remember.

Q. What was it, in your judgment, that broke the port?

A. Some wreckage.

Q. What makes you think that?

A. I don't suppose the sea could break it.

Q. Do you ever remember port lights to have broken from the force of the sea?

A. No.

Q. Were those in the bow of the ship unprotected on this day?

A. Yes.

Q. None of them were broken?

A. No.

Q. Did they receive more or less force from the sea, as you were going into the sea you described?

A. Most likely received more, because they are in the bow.
15 Q. Where was this one?

A. Well, on the bluff of the bow. It is well along in the ship—not to say in the forward part of the bow at all.

Q. Will your log, if it is found, contain a true account of the weather on that day?

A. Oh, certainly.

Q. Where was the mate's log of the voyage left at the end of the voyage?

A. We don't know where it was left. Johnson & Higgins declared they gave it to the mate.

Q. It was left at Johnson & Higgins' Philadelphia office, was it?

A. It was left at Johnson & Higgins' to draw up the protest. I remember getting a letter from Bowring & Archibald, called to my mind by a copy I saw today, asking me for this log book, and instructing me to direct it to Convers & Kirlin, but my memory don't serve me enough to say did I or didn't I mail it to them, although I am under the impression I did, and for one reason why I think I did, there would have been more search made for it had I not sent the log to them.

Q. You don't remember ever to have seen it since you left it at Johnson & Higgins'?

A. I won't swear to it that I did, but I am under the impression that I directed that book to Convers & Kirlin, and took it up to Bowring & Archibald's.

Q. (Handing witness a copy of the protest.) Is that a copy of the protest that was made out by Johnson & Higgins of Philadelphia?

Objected to.

A. Yes.

Q. Does that purport to be a copy of the protest?

A. Certainly, and covers the ship, etc., and the names of the people that were on her at that time.

Objected to.

Q. Are those names, Joseph Clark, Joseph Nicholson, H. Shotell, James Allen and Henry Allen, members of your crew at that time?

A. Yes.

Mr. KIRLIN: I offer the protest.

16 Mr. BURLINGHAM: I object to it.

Mr. KIRLIN: I ask to have it marked for identification Claimant's Exhibit C, Nov. 1st, 1894.

Q. On arrival at Philadelphia, did you find any portion of the cargo damaged?

A. Yes.

Q. Where was the damaged cargo?

A. In No. 2 hold, principally.

Q. How did the water get from the steerage into the No. 2 hold?

A. Along the 'tween-decks.

Q. Were the 'tween-decks hatches No. 1 or in the steerage on and battened down?

A. Yes.

Q. How did it come the water didn't get down there?

A. I don't say it didn't.

Q. You think there was damage in the No. 1 and No. 2 both, do you?

A. Yes; as near as I remember, there was some in No. 1.

Q. But the principal was in No. 2?

A. Yes.

Q. How did it get down into the lower hold?

A. Through the scuppers and over the coamings of No. 2 hatch.

Q. Was there cargo in No. 2, 'tween-decks?

A. Yes.

Q. What?

A. Sugar in bags; all sugar.

Q. How is the forward part of the ship drained to the engine-room, through pipes or sluices?

A. Both.

Q. Are there limbers in the No. 1 and No. 2, alongside the ballast tank?

A. The ballast tank only reaches to about half of No. 2 hatch forward.

Q. And is the floor over a well of the No. 2?

A. Over the frame of the ship—ordinary limbers of the ship.

Q. How does the water get from there to the engine?

A. We can open the sluices and let it into the engine-room bilges through the engine-room bulkhead, or the ordinary pumps of the fore hold.

Q. Do you remember how many bags were damaged?

A. No; I couldn't say.

Q. As soon as the water was discovered, what was done?

A. Ba-led all out we could get; all that left; started the pumps going.

17 Q. Was there any other way in which sea water could have entered and got upon the cargo on that voyage, except through that port on that occasion?

A. No.

Q. In what sort of general navigable condition was this vessel maintained by the owners?

A. First class.

Q. Was she wanting in any respect, so far as you knew?

A. No, sir.

Q. How much of the cargo was delivered in Philadelphia?

A. The entire cargo.

Q. Was it in the same condition as received, except for the sea damage that you have mentioned?

A. Yes.

Q. When are you going to sea?

A. Friday noon.

Q. What do you mean by a norther?

A. It is the name of a storm that we get down about Galveston and Tampico and the West Indies.

Cross-examination by Mr. BURLINGHAM:

Q. Were you on board during the receipt of the cargo at Mantanzas?
Q. Part of the time.
Q. How much of the time; half an hour a day?
A. Oh, yes; I suppose say half the time, more or less.
Q. Did your first officer receive the cargo—give receipts for it?
A. First and second officers.
Q. The duty was placed upon them by you to tally in cargo?
A. Yes.
Q. The cargo as it came on board was in good condition, as far as you saw, wasn't it?
A. Yes.
Q. Centrifugal sugar it was, wasn't it?
A. I believe it was.
Q. Was it stained?
A. No.
Q. Apparently in good order?
A. Yes.
Q. Bags in sound condition?
A. Yes.
Q. Seem full?
A. Yes.
Q. All that you saw?
A. Yes.
Q. Who stowed it?
A. Stevedores from the shore.
Q. Were they on board night and day?
A. They went ashore every night.
18 Q. How many bags did you receive; can you tell by looking at the bill of lading?
A. (Witness looks at bill of lading.) 13,227 bags of sugar.
Q. You received that number at Matanzas?
A. Yes; that is the bill of lading; that is signed by me.

Mr. KIRLIN: We understand there is no claim for shortage here. If there is, we want notice of it now.

Mr. BURLINGHAM: There is no claim for a shortage in the number of bags. There is a claim for loss in weight as well as for depreciation in quality.

Q. Did you give any orders to your men about the ports, the day before you sailed, or the day you sailed?
A. Yes.
Q. To whom?
A. The chief officer.
Q. What orders did you give him?
A. See that all ports were carefully closed.
Q. Did you actually say that to him?
A. Yes, I think the day before we sailed I distinctly remember giving him that order.

Q. Did you give him any orders about shutting the dummies?
A. No; can't say I did distinctly about the dummies.
Q. There are no shutters on the outside of the ship over these glasses?
A. No.
Q. But in the steerage you have referred to there are dummies on all the ports?
A. Yes.
Q. You did not go in the steerage, I suppose, after the cargo was loaded and before the ship sailed?
A. Oh, no.
Q. The first time you went into the steerage was after you heard of this damage?
A. Yes; at that time.
Q. Now you came out from shore about six o'clock on the evening of the 15th?
A. The day before we finished, anyway, as near as I remember, just before dark.
Q. And, of course, you wanted to know what your vessel's marks were, so you had men row you round?
A. Yes.
19 Q. Shore boat or your own?
A. Shore boat.
Q. And the draft forward and aft, of course, was entered in the log?
A. In the official log.
Q. In the official log, as well as the mate's log?
A. Yes.
Q. You have got the official log?
A. Yes.
Q. Anything in the official log about this damage?
A. No.
Q. That is in the mate's log?
A. Yes.
Q. What you rowed around for was to see those marks, wasn't it?
A. To see that she is in trim and any other thing; to see that she was properly loaded.
Q. You wanted her by the stern?
A. Yes.
Q. And you saw she was about six inches by the stern?
A. Yes.
Q. Your object in going round wasn't to look at the ports, was it?
A. No, not specially. No matter where I am, when I come alongside the ship I just take a look at the vessel, at the mark, the ports—anything.
Q. Are you prepared to say under oath that all the ports in that vessel, as you rowed around in the dusk, were closed?
A. It was not dusk.
Q. Are you prepared to say under oath that that afternoon when you rowed around your ship to look at her marks and see her trim you saw that all the ports in the steerage were shut?
A. Yes, I do say so.

Q. Will you say that all the other ports in the ship were shut?
A. No, I will not.
Q. Tell us which ones were open?
A. In the forecastle—they were open.
Q. You did not have any passengers, did you?
A. No.
Q. You had cargo in this so-called steerage?
A. No.
Q. Nothing in it?
A. No.
Q. What is it for?
A. Steerage passengers.
Q. What was it used for on this occasion?
A. We had some lines, a little stores, and one thing and another there.

Q. Do you mean that there was perfectly easy access to
20 that steerage at all times during this voyage?
A. Yes.

Q. Nothing to prevent a man from seeing whether anything had happened to those ports by going down there into the steerage?
A. Nothing in the world to hinder him from seeing all around.
Q. How ma-y feet from the stem was this broken port light?
A. I should say a matter of 30 feet, perhaps more.
Q. You don't call that the bluff of the bow, do you?
A. Yes.
Q. How far forward of the foremast was it?
A. Say a matter of 12 feet.
Q. How is she rigged?
A. Schooner—2 masts.
Q. Now you say that particular port light was 8 or 9 feet above the water as she was loaded?
A. Yes, when the ship was loaded.
Q. That is the reason why you say that no sea could have broken it?
A. Yes.
Q. Too high up?
A. Too high up.
Q. Was there anything the matter with the dummie on the inside of that port light?
A. Not that I am aware of.
Q. Could it have been shut when you left Matanzas, just as well as after you discovered it?
A. Yes.
Q. No particular reason for leaving it open, was there?
A. Yes; we wanted to go down there at any time, for stores, oils, lights and so on.
Q. Now, when you went down there, Captain, after the damage, did you find all the other dummies open or closed?
A. As near as I remember, they were open.
Q. You say that even with the glass of the light broken, the

dummie being closed, there was only a trifle of water that came in, don't you?

A. Yes.

Q. Not enough to damage cargo at all?

A. No, only a mere weep.

Q. It wouldn't have gone down through the 'tween-deck-?

A. Even if it had, there is is enough scuppers to carry off a little water of that kind.

21 Q. It is drained by scuppers where?

A. Down the sides of the ship into the bilges.

Q. If any quantity of water gets there, the scuppers are not able to carry it out?

A. Yes.

Q. It is bound to go over the coamings?

A. Yes.

Q. Will it leak through into the hold?

A. Yes, I suppose it would.

Q. The 'tween-decks is not perfectly tight?

A. Yes, iron.

Q. Meant to be water-tight?

A. Yes.

Q. I understood you to say, in answer to Mr. Kirlin's question, that the water got into the lower hold not only through the hatches but through the scuppers.

A. Through the scuppers it would naturally go to the bilges.

Q. There was so much of it, that as it went down through the scuppers, it rose over the floor of the ship in the lower hold?

A. No.

Q. This damage to the sugar in the lower hold was by sea water that came over through a break, and over the coamings in the hatch, and that alone?

A. That alone.

Q. Now how was the wind when you left Matanzas?

A. Northerly, I believe a strong bre-ze.

Q. Do you mean from the north?

A. Yes.

Q. Any change in it that day?

A. As near as I remember, it blowed hard all day.

Q. How much was your vessel making; what was her deep draft speed loaded?

A. Ten knots.

Q. What course did you steer from Matanzas?

A. It would be a northerly course. I won't say the exact course. It would be a northerly course to go over into the Florida channel.

Q. What sort of a breeze was that?

A. A moderate gale.

Q. Measure it in knots. What kind of a breeze would you call it?

A. A moderate wind.

Q. Didn't slow down for it?

A. I don't think we did.

22 Q. Do you know how much you made that day per hour?

A. As far as I remember, we were making about seven knots.

Q. That is as much as you can make with a northerly breeze?

A. Going against the wind it would be all we could make, and if there was more, we wouldn't make so much.

Q. You say you saw no wreckage?

A. Not to my knowledge.

Q. Do you think that some wreckage broke this glass?

A. I only say that because I don't think it could have been broken by the sea.

Q. That is a mere conjecture?

A. Yes.

Q. No wreckage came through the port?

A. No.

Q. Nothing was found in the steerage?

A. No.

Q. Did any of the officers or crew report having seen any wreckage to you?

A. Not that I remember.

Q. Did you have any entry made in the log about wreckage?

A. Not that I know of.

Q. Well, of course, if you had seen any wreckage you would have slowed down for it. You wouldn't have gone through it at full speed?

A. No, certainly not.

Q. Was it a clear day?

A. Perfectly clear.

Q. The first you knew of any trouble was the engineer reporting there was water in the hold?

A. Yes.

Q. Coming through into the engine-room?

A. Through the iron bulkhead—through the doors. You see there is doors in this bulkhead from the engine-room into No. 2. These doors are supposed to be water-tight, but if the water gets up against them the water comes through them.

Q. Did any leak?

A. Yes.

Q. Did the hold actually get full of water?

A. Oh, no; see the water dripping down. This door in the bulkhead is screwed in and supposed to be perfectly water-tight, but we found some little water weeping through it—showing that there was water in the hold up above the ceiling.

Q. Now, did you sound the well?

A. Yes.

23 Q. How much water was in No. 2?

A. Very little.

Q. Where had it gone?

A. It was upon the ceiling instead of going down below. It was on the floor of the ship. You understand how the floor is. That

was sufficiently tight to keep the water up there—not let it go down into the bilge.

Q. So the sugar was resting in water?

A. Yes.

Q. How did you get it out?

A. It drained out in time. We kept the pumps going on it. The pumps were going for the greater part of the day after, before it was all drained down.

Q. When you found this water coming through the bulkhead, what did you do?

A. Instituted a search to find where it was coming in.

Q. Did your yourself make it?

A. I was round with the rest. I was looking out to see if I could find any of the ports open from the outside.

Q. How long did it take you?

A. It was not long. I saw them going around. I sent the carpenter down forward, and we were looking round the ship, and presently he reported that the glass was broken in the steerage.

Q. Then you went right in there?

A. Yes.

Q. How much water did you find there?

A. A foot deep, say, in the after part of the steerage; there was nothing in the fore part, because it had gone aft.

Q. The 'tween-decks rise there?

A. Certainly, toward the bow.

Q. How high are the coamings of the hatch?

A. I suppose the 'tween-decks coamings are, say, a foot or 15 inches high.

Q. Was it pouring over the coamings then?

A. We couldn't see these coamings. These coamings I speak of are in the No. 2 hatch. The steerage is along No. 1.

Q. But it passed from No. 1 'tween-decks into No. 2 'tween-decks?

A. Certainly.

Q. How did it get there?

A. There is only a wooden bulkhead between the No. 1 hatches and No. 2 'tween-decks.

Q. What sort of a wooden bulkhead?

24 A. A wooden bulkhead. It is built, as I understand, with 2-inch plank and rounded with 1¼-inch board, and not sealed; and then in No. 2 'tween-decks, there was cargo—completely filled with bags of sugar. It was very near all full.

Q. And this water from the steerage or No. 1 'tween-decks was going through the bulkhead into No. 2 'tween-decks?

A. Certainly.

Q. And it damaged cargo there?

A. Certainly.

Q. Then it went from there over the hatch from No. 2 'tween-decks into the lower hold, and damaged the cargo there?

A. Certainly.

Q. You have no reason to know when that water began to come in there, of course?

A. No.

Q. The only way you would find it out would be by some one happening to go down there into the steerage, or through the evidence that came through the pumps, or as it did happen, through the engine-room bulkhead?

A. No.

Q. Did you pump sugar after that?

A. Not sugar, but you could see that it was something more — water—molasses, more or less.

Q. After the dummie was shut you had no more water coming in?

A. No.

Q. Did you see the cargo delivered in Philadelphia?

A. Yes, part of it; I was back and forth there all the time.

Q. Did they pile up the damaged sugar in a separate pile?

A. I couldn't say.

Q. Didn't you see a separate pile of damaged bags?

A. I saw some damaged sugar piled up in a pile.

Q. There was no doubt that that sugar was damaged, was there, in your mind?

A. Certainly the sugar was damaged by salt water, sure.

Q. Have you ever carried sugar in bags before?

A. Yes.

Q. Ever had damage before?

A. Not to such an extent.

Q. Never as bad as this?

A. Oh, no.

Q. Do you know of an inspector in Philadelphia named
25 Barrett?

A. Not to know him personally, I don't.

Q. Did an inspector come down there at your request or the request of Westergaard & Co. and make examination of the damage and of the vessel?

A. There was an inspector came down there.

Q. L. Westergaard & Co. were the agents of your steamer in Philadelphia?

A. Yes.

Q. Well, somebody came down for them and looked over the steamer?

A. Yes, somebody came down.

Q. Didn't you have a talk with him?

A. Yes.

Q. Didn't you tell him that that glass had been stove in by the sea?

A. As far as I knew—yes.

Q. Now you say you are sure it was not?

A. It was not stove in by the sea; I couldn't say what caused it.

Q. You said today that that was not stove in by a sea?

A. It must have been by something.

Q. It was a mere surmise on your part?

A. I say I think it was improbable that a sea did it. I wouldn't say it was impossible.

Q. Now, after this damage, is it not a fact that you had all the shutters on the side of that steerage closed for the rest of the voyage?

A. I don't know that we did.

Q. When you got to Philadelphia, were they not closed?

A. I don't think they were; I wouldn't say they were or were not. I should think that the whole thing was opened up in Philadelphia.

Q. Before you got to Philadelphia?

A. We had fine weather all the way up; I think they would be opened before we got to Philadelphia.

Q. There was not anything extraordinary about this weather, was there?

A. I have seen it blow harder. There is nothing extraordinary in a gale of wind.

Q. Did it carry anything away?

A. It busted up some tarpaulins and ventilators, etc.

Q. What did it?

A. The sea.

Q. How much freeboard had she, at the foremast, say?

26 A. I should say a matter of at least 8 feet, or more than that. She must have had at least 9 or 10 feet freeboard at the foremast. We have 6 feet of freeboard at our plimsoll's mark. The plimsoll's mark was not down at the water at that time.

Q. At this place where the port light was broken, how much freeboard was there?

A. I should say a matter of 11 feet.

Q. At the stem?

A. Perhaps 14 or 15 feet.

Q. Didn't you make any inquiries in Philadelphia, or investigation as to the number of bags damaged?

A. No.

Q. Do you think that any of the bags of damaged sugar were damaged by anything other than this water that came through the port?

A. No.

Q. Are you sure of that?

A. To the best of my knowledge.

Q. Where did you begin this voyage which you completed at this time?

A. We went from Philadelphia.

Q. To where?

A. From Philadelphia to Tucacas, in Venezuela, thence to Matanzas, calling at Porto Cabellos.

Q. How much water did you bail out of the 'tween-decks?

A. All there was there.

Q. How much was there?

A. As I said before, there was a matter of a foot high.

Redirect by Mr. KIRLIN:

Q. Captain, did they carry any steerage passengers in that steerage up to the time of this occurrence?

A. I don't remember that we had steerage passengers before that time. Only a very few anyway. I think we had a few.

Q. Just recall what voyages you made after you joined her.

A. I joined her in St. Johns. We went from there to Pilley's island, near by, and back to St. Johns. It is just possible we may have had some steerage passengers from St. Johns to Halifax. Then we came from Halifax to New York. We went from New York to Philadelphia, and loaded a cargo of coal for Tucacas, and we had none on that voyage.

27 Q. How do steerage passengers go into the steerage at present?

A. We have a proper companionway built.

Q. Where is it?

A. In the after part of the steerage.

Q. At the time of the voyage from Matanzas to Philadelphia, was that companionway there?

A. No.

Q. How did you get down into the steerage?

A. Down the forehatch.

Q. When you sailed from Matanzas, do you know whether the forehatch was battened down or not?

A. Yes; I should say it was.

Q. How could any one get down there without unbattening the hatch?

A. Couldn't get down at all.

Q. On your cross-examination you were asked whether there was anything to prevent going in there, or easy access?

A. There was; but you could open the hatch and go down.

Q. Had the hatches of the forehatch been unbattened at any time before this water was discovered, after you battened them down in Matanzas, so far as you know?

A. No, I believe not.

Q. You say you have been in heavier storms than you had on the 16th or 17th of February; what sort of a storm was this; was it a storm at all?

A. Certainly.

Q. Describe it.

A. What we would call a gale.

Q. What did the ship do in the storm?

A. She plunged a good deal.

Q. Any water come on deck?

A. Certainly, over forward.

Q. During how long a period?

A. During the early part of that day.

Q. How long did it continue to come aboard?

A. During the greater part of that day.

Q. Did the sea do any damage on deck?

A. Yes.

Q. What, if you recollect?

A. Broke some ventilators, forecastle funnels and like things?

Q. Where were the tarpaulins that were said to be damaged?

A. On the forehatch.

28 Q. How many of the members of that crew are now with the ship?

A. Three besides myself.

Q. And are they here for examination today?

A. No, not all of them.

Q. How many are here?

A. There is one belonging to the ship still; he is the mess-room boy. This assistant steward is one that was. Now we have the carpenter, the mate and the second engineer here. All the rest have left the ship.

Recross-examination by Mr. BURLINGHAM:

Q. I thought you said on your cross-examination, that you had ropes and stores in the steerage?

A. Yes.

Q. When you battened down the hatch, did you mean to keep it battened down during the whole voyage?

A. If necessary, and we didn't want to go down there—certainly.

Q. What do you mean by battening down?

A. In battening down we put tarpaulins on the hatch, put the battens in, and drive the wedges in; that is the way a hatch is battened down in all cases.

Q. What kind of things did you have down there?

A. We had ropes.

Q. Were they for use on this voyage?

A. For hauling lines, and anything we might require—spare gear and the like.

Q. Was there any access to that steerage through that hatch?

A. That is the way we had at that time.

Q. Did you order the hatch battened down?

A. I can't say I ordered that hatch to be battened down any more than I ordered any other hatch.

Q. Did you know it was battened down when you left Matanzas?

A. Certainly I did.

Q. Did you know at that time the port dummies were not shut in that steerage?

A. I couldn't say.

Q. Do you mean to say that you allowed that hatch to be battened down without seeing that those dummies were closed there?

A. Yes.

Q. Was there nothing down there that could get adrift?

A. Yes.

29 Q. What was there besides rope there?

A. Nothing anyway near this port.

Q. Did you never before hear of a port being stove in?

A. Not that I know of.

Q. On any vessel?

A. No.

Q. The idea of a port being stove in never entered your head until this case?

A. No.

Q. If it had, I suppose you would have seen that those dummies were closed?

A. I should certainly have ordered them to be closed, and have it understood that they were closed.

Q. You don't go to sea now with hatches battened down and dummies opened in that steerage?

A. Because we don't have the steerage closed up there. We have a steward up and down there all the time. We have our ice-house down there.

Q. To see how things are going on down there?

A. Yes.

JOSEPH NICHOLSON, chief mate, being duly sworn, testifies:

Examined by Mr. KIRLIN:

Q. Were you chief officer of the *Silvia* on the voyage from Matanzas to Philadelphia, when there was some damage to sugar, in February of this year?

A. Yes.

Q. How long have you been with the steamship *Silvia?*

A. I sailed from London last Nov. 25th.

Q. Was this steerage in the 'tween-decks No. 1 hold when you joined her?

A. They were fitting her in London when I joined her.

Q. Had they ever carried passengers before this voyage?

A. No, sir.

Q. Positive about that?

A. Certain.

Q. On the voyage from England out, were there ports in this steerage?

A. Same as they are now.

Q. What was in the steerage then?

A. Ropes and some spare gearing.

30 Q. Did you have the shutters open or shut?

A. Shutters open.

Q. Was there any damage to the glass ports?

A. No, sir.

Q. Had there ever been any damage to those glass ports from the time you joined her until this occasion?

A. No.

Q. Do you know what the thickness of the glass is?

A. Five-eighths of an inch.

Q. Have they ever been measured?

A. Yes.

Q. Do you know what the breadth of the port is?

A. Eight inches.

Q. The glass is in a brass frame?

A. Yes.

Q. Now, what was in the steerage on all the voyages after you joined the ship to the voyage from Matanzas to Philadelphia?

A. Just ropes and spare gear, &c.

Q. Had the shutters ever been shut?

A. No, sir; never shut then.

Q. How long have you been going to sea in steamships?

A. Five years last April.

Q. How many steamships have you been in?

A. Five.

Q. What has been the practice in the vessels you have been in, as to protecting these glass ports by closing iron shutters inside of them?

Objected to.

Q. Has there been any practice of that kind?

Objected to.

A. We don't close the shutters at sea.

Q. What do you depend on to keep the sea out?

Objected to.

A. The glass.

Q. How is the forecastle of the steamships that you have been in lighted?

A. By the side ports.

Q. Any shutters to those?

A. Yes.

Q. Are they ever shut?

Objected to.

31 Q. Did you ever know of any ports being broken by the sea?

Objected to.

A. No.

Q. Did you ever hear of it?

Objected to.

A. No.

Q. How did you go in and out of this steerage at the time of this damage?

A. At that time we had to enter from the forehatch. Since then the companionway has been built. The same as going into the hold.

Q. Whose immediate business was it to close the ports before starting on this voyage from Matanzas to Philadelphia?

A. Mine and the carpenter's.

Q. Did you have any instructions from any one the day before you sailed?

A. Yes, the captain.

Q. What did he say?

A. Be sure all the ports are closed and right.
Q. Did he say anything about closing iron shutters?
A. No.
Q. When did you finish taking in the cargo at Matanzas?
A. As far as I can remember it was about sunset. Couldn't tell, for an hour or so.
Q. Do you remember the day?
A. It was on a Thursday night.
Q. On the next day you went to sea?
A. Yes, in the morning.
Q. Did you see whether the ports in the steerage were closed?
A. Yes, was down there before we battened the hatches down.
Q. When was that?
A. The night before we sailed.
Q. What did you find about the ports?
A. Everything all right.
Q. Did you try them yourself?
A. Yes.
Q. How many were there in the steerage?
A. I cannot say whether there are four or five on each side.
32 Q. Which one was it that was broken on the voyage?
A. The starboard forward one in the steerage.
Q. Particularly are you able to say whether that was shut and fastened?
A. Certain, sir.
Q. What was the condition of the glass?
A. Glass all right; new glass in them.
Q. New when?
A. New in London when the ship left.
Q. After you examined the ports and went on deck was there anybody below?
A. No; we put the hatches on and battened them down.
Q. After you examined the ports you went on deck, closed No. 1 hatch and battened it down; was anybody in the steerage after that until after the accident was discovered?
A. No one could get in.
Q. How high was the port above the water line of the vessel, as the vessel was loaded?
A. Eight feet.
Q. Was there any lighter on that side of the ship?
A. Never had lighters that side; loaded all on the port side.
Q. Was there anything along that side of the ship between the time when you examined it on the night before you sailed and the time you sailed?
A. Nothing at all.
Q. What kind of weather did you have on leaving Matanzas?
A. There was a fresh breeze leaving.
Q. What kind of weather did you find when you got outside?
A. A few hours out we got into the tail end of a norther.
Q. How was the sea running with reference to your course?
A. The sea was about end on.

Q. Was there enough of it to come aboard?
A. Oh, yes; a short, choppy sea.
Q. Much wind?
A. No, not much; short, choppy sea, and just the tail end of the breeze.
Q. Any damage done?
A. A little done; the ventilators and that, in the forecastle.
Q. There was something done to the funnel?
A. Yes, the firemen's funnel. That is just at the break of the forecastle. Of course the seas coming down over the fore-
33 castle would drop about four feet to the main deck. It was the funnel flange that was broken; the firemen's bogie funnel, used for a stove.
Q. Do you know what it was that broke the side light?
A. No.
Q. What is your opinion about it?
A. My opinion is that it was wreckage.
Q. Did you see any wreckage?
A. No.
Q. What makes you think it was wreckage?
A. It is the most likely thing.
Q. What makes you think the sea wouldn't break it?
A. The 58⅝ glass? We have often been in head seas going up to Newfoundland, and our ports never broke. We never have any shutters on them.
Q. Were there any shutters on the ports in the forecastle on this occasion?
A. The shutters were on, but they were not closed.
Q. Was there any damage to any of those?
A. No, sir.
Q. How far is it from the top of this port to the deck of the ship?
A. I suppose it would be about 2 feet.
Q. Has the ship bulwarks or a rail?
A. About a foot of bulwark and a rail on top of that again.
Q. I mean the main deck?
A. Yes; the main deck.
Q. Where was this port on the side of the ship?
A. Just about on the bluff of the bow.
Q. How far back from the stem?
A. About 30 feet, I suppose.
Q. When was your attention first directed to this broken port?
A. When we opened the steerage.
Q. What time of day?
A. Afternoon; between three and four.
Q. How did you come to open the hatches?
A. The second engineer came and said there was water in the main hold.
Q. Where did you go first?
A. We looked at the main hatch first, I think. We opened both hatches. Some opened No. 2 and some opened No. 1, and looked down, and soon we seen the water there.

Q. Where did you see the water first?

34 A. In No. 1 'tween-decks. I think we had No. 1 hatch off first, if I remember.

Q. Did you go down then?

A. Yes.

Q. What did you find?

A. Found the port broken.

Q. Did you see any of the glass?

A. Yes, sir, the glass was lying about the 'tween-decks.

Q. Any of it in the frame?

A. Yes, a jagged piece was in the frame.

Q. How much water was in the steerage?

A. About a foot lying on the floor in the after end of it.

Q. Was any of it going down the No. 1 'tween-deck hatch?

A. The steerage is No. 1 'tween-deck hatch.

Q. Did any water go down there to the lower hold of No. 1?

A. No, sir, not in No. 1; went back into No. 2; ran along to No. 2.

Q. When you discharged the cargo in New York, where did you find the most damage to the sugar?

A. In No. 2.

Q. What parts of the hold?

A. After part of it, just in the way of the main hatch.

Q. You mean under the main hatch?

A. Yes; just abreast of it and towards the wing.

Q. One side or both sides?

A. There was a little on the starboard side, but the most of it was on the port side.

Q. Was there damage in the 'tween-decks?

A. Yes, sir.

Q. How high up?

A. About four or five tiers of sugar, or three or four tiers.

Q. Was the sugar in bags?

A. Yes.

Q. How was it stowed?

A. Stowed in the usual fashion.

Q. How? Bag on bag, packed tight?

A. Yes.

Q. How had the water got down into the lower No. 2 hold?

A. Washed over the coamings.

Q. How high are they?

A. About 8 inches, I should think, the 'tween-deck hatches.

Q. When you got into the lower hold was there anything in the nature of the damage to the cargo there that indicated that

35 how the water had gone when it got down through the 'tween-deck hatchway?

A. Well the water had run down a little bit, and settled down, and as the ship rolled it rolled over to the wings and ran down the side of the ship. When we were taking the cargo out, just immediately underneath the 'tween-decks it was not so bad. Then in the

wing, where the water worked its way down, the bags were damaged right down through to the bottom.

Q. Was there any damage on the bottom tiers?

A. Yes, sir.

Q. Was there any damage in the heart of the cargo?

A. Just in this one particular place in the after part of the main hatch, there was a little bit—not much. The very heart of the cargo is in the square of the main hatch. There was damage there, but then between the main hatch and the ship's side, say half way along, there was plenty of sugar in good order. Just in the wings and right in the main hatch, the damage was there, and under the 'tween-decks, the top tier under the 'tween-decks.

Q. Did you go down into the engine-room after you found out the source of this water?

A. Yes, down in the stoke-hole.

Q. Did you see anything there that indicated water in the lower hold?

A. Yes, we could see water coming through the door in the bulkhead.

Q. Were the pumps tried?

A. Yes.

Q. Any water come?

A. No.

Q. Were the sluices opened?

A. Yes.

Q. Any water come through them?

A. A little.

Q. What is the reason the water didn't go down in the limbers?

A. The floors are grain-tight.

Q. What was done to relieve the water from the hold, and allow it to get in the engine-room?

A. Tapped a hole in the bulkshead.

Q. How big a hole?

A. Might be three-quarters of an inch.

Q. Amidship or on the side?

A. It was about half way between the hatch coamings and the port side of the ship.

36 Q. It was the port door, was it, in the engine-room, that you saw weeping?

A. Yes.

Q. And it was between that and the port side of the ship the hole was made?

A. Yes.

Q. How far to port of amidship in that door—from the keel to that door?

A. Twelve feet. Then the door itself is about two feet or two feet three.

Q. Then how far off that was the hole made?

A. Two or three feet, I think.

Q. Where was this hole, with reference to the ceiling in the hold?

A. Just level—flush with the ceiling—the floor on top of the ballast tank.

Q. Does that ballast tank run through the engine-room on the same level?

A. Yes.

Q. Limbers on both sides?

A. Yes.

Q. Did the water come through fast?

A. Not so very fast; of course it was rather molasses.

Q. How long did it continue to drain through that hole?

A. I think about twenty-four hours, as near as I can recollect.

Q. When you went in the steerage did you see any water coming through the broken port?

A. Yes, when she dipped down into the sea.

Q. What did you do to stop that?

A. Put the shutter down.

Q. Did that stop it?

A. There was a little weep after it.

Q. Did that do any damage?

A. The scuppers took that away.

Q. Were any of the other shutters shut then?

A. No.

Q. Were they ever shut since?

A. Not to my knowledge.

Q. Why didn't you repair the glass right away?

A. Weather wasn't good enough.

Q. When did the weather become good enough for that?

A. I think it was about Saturday night. It was on a Sunday morning we put the glass in.

Q. Then the port was closed again, was it?

A. Yes.

Q. What was done with the shutter after that?

A. It was left open.

Q. What thickness of glass was put in?

A. $\frac{3}{4}$.

37 Q. Was that the same size as the other?

A. Yes.

Q. Where did you get the glass?

A. We have spare glasses.

Q. Some that you brought from London?

A. Yes, most likely came from London.

Q. In your judgment, are those side lights strong enough to stand extraordinary pressure of sea water against them?

A. I have always found them to do so.

Q. When are you going to sea?

A. On Saturday.

Cross-examination.

By Mr. BURLINGHAM:

Q. This was not very bad weather that you had leaving Matanzas, was it?

A. No, sir.

Q. You do not call that extraordinary weather in any way?

A. No.

Q. And that is the reason why you think the sea did not break that light?

A. Yes.

Q. Now, these port lights in the forecastle have shutters, have they?

A. Yes, sir.

Q. But you don't close them?

A. No, sir.

Q. Because you want light in the forecastle?

A. Yes.

Q. Now, you did not need any light in the steerage on that vessel, did you?

A. We had to have light going down about our stores.

Q. But you battened the hatches down there?

A. Yes.

Q. Did you superintend that yourself?

A. Yes.

Q. Did you batten it securely?

A. Yes.

Q. Did you have anything in there that you would need in the ordinary course of a voyage from Matanzas to Philadelphia?

A. We had just waste in there and ropes. Still there was nothing that we wanted there.

Q. Any spars?

A. No.

Q. Ropes?

A. Ropes and sails and gear.

Q. Tackle?

A. No.

Q. Locks?

A. No.

Q. Don't you keep locks down there?

A. No.

Q. Where do you keep them?

A. In the boatswain's locker.

38 Q. You don't think there was any need of light down there with the hatches battened down? There would have been no difficulty, of course, in closing those shutters?

A. No difficulty—if it was necessary.

Q. Now, when you went down there after discovering the water in the vessel, did you personally shut the dummie on that particular light, or had the carpenter done it before?

A. I was the first down, and the carpenter he shut it by my order.

Q. Did you leave the others open?
A. Yes.
Q. Did you ever batten the hatch down again, after that on the voyage up to Philadelphia?
A. Certainly.
Q. When?
A. As soon as we came up.
Q. When did you open it again?
A. Opened it again on Sunday morning.
Q. To put the light in?
A. Yes.
Q. Then battened it down again?
A. Yes.
Q. How long does it take you to get it open and go down; two minutes?
A. A couple of minutes, I suppose. Perhaps do it in less in extra pressure. Only a matter of knocking three or four wedges out.

Mr. KIRLIN:

Q. Was it opened again on the voyage?
A. I really couldn't remember. We might have and might not.

Mr. BURLINGHAM:

Q. Wasn't the hatch that leads from No. 1 'tween-decks to the lower hold on?
A. No, sir; the cargo was stowed up there. There is a wooden trunkway comes there, right up to the upper deck.
Q. Where does this vessel hail from?
A. Liverpool, now.
Q. Who is the owner, if you know?
A. C. T. Bowring & Co.
Q. You joined her as first officer in London?
A. No, I brought her out to the coast. I was master.
Q. From London?
A. Yes.
Q. Did you say new glasses were put in in London?
A. Yes, ports in the steerage were new ports in London, sir.
39 Q. They were made just before you started out?
A. I couldn't say how many had been there, or how many was new. There was some ports right along the ship's side, but there was some additional ones put in before I joined her.
Q. You could tell from the looks of the glass whether this particular one was a new one or not, was it?
A. I don't know; it has all been painted.
Q. I don't mean now?
A. Well, I don't remember that, of course.
Q. Those ports were put in the steerage, so it might be used for steerage passengers?
A. Yes.
Q. No need of them if they were to carry cargo there?
A. No. She had ports before when she was only carrying cargo.

Q. What for?
A. I don't know what for.
Q. Wasn't it with a view to the possibility of carrying passengers at some time?
A. There are ports right fore and aft in every hold in the 'tween-decks.
Q. Were any of those put in in London?
A. No, sir.
Q. Was the cargo in No. 2 'tween-decks put in in Matanzas?
A. Yes, sir.
Q. Did you leave the inside shutters open?
A. Yes, sir.
Q. Sure of that?
A. Yes, sir; as far as I remember about it, they were.
Q. I want to know positively.
A. As far as I remember about it, they were.
Q. Were you down in the 'tween-decks while they were stowing the sugar?
A. Yes.
Q. Think it over, and tell me whether you're ready to swear that the shutters in No. 2 'tween-decks were left open when that cargo was put in?
A. Yes; they were open.
Q. And when you sailed from Matanzas those shutters were open?
A. Yes.
Q. You are sure of that?
A. Yes; I am pretty certain of it.
Q. Was it your duty to see to those ports?
A. Mine and the carpenter's.
Q. What was your object in leaving them open?
A. I don't know; for light, for one thing, when you are working.
Q. But after the loading is completed, what is the object of leaving the shutters open in cargo hold in the 'tween-decks?
A. I don't know that there was any object.
Q. Did you give the matter any thought?
A. It is a thing that is always done.
Q. Always, where?
A. The shutters.
Q. The world over, you mean?
A. Yes.
Q. You have never been on but four steamships?
A. That is all.
Q. Ever carried sugar before?
A. Not in bags; never before.
Q. What kind of sugar have you carried?
A. Carried sugar in cases; refined sugar in cases.
Q. Do I understand you to say you never heard of such a thing as a glass port light being stove in, in your experience at sea?
A. Never heard tell of them being broken by mere gales, and that sort of thing.

Q. You never heard of them being stove in by sea or by wreckage?
A. No, sir.
Q. What is it that makes you think that it was probably wreckage that broke this?
A. My own judgment.
Q. It was a mere conjecture?
A. My own judgment.
Q. Was any wreckage reported to you?
A. No, sir.
Q. Started from Matanzas at what time?
A. Six o'clock.
Q. Clear day?
A. Yes.
Q. Have a lookout?
A. Yes.
Q. Where?
A. On the bridge.
Q. How far was that forward?
A. About 100 feet from the stem.
Q. And the forecastle is further forward than this port, is it not?
A. Yes.
41 Q. And the lookout was there all the time?
A. Yes.
Q. You didn't see any wreckage, did you?
A. No.
Q. You didn't hear any reported to you?
A. The wreckage might pass.
Q. None of the men reported seeing any wreckage?
A. No, sir.
Q. There was not any sign of wreckage inside the steerage when you went down there?
A. No, sir.
Q. Now did you tally a part of this cargo in?
A. Yes.
Q. And the second officer the rest?
A. Second and third.
Q. Are they on the ship now?
A. No, sir.
Q. When did they leave?
A. The second officer left last July; somewhere about that.
Q. And the other one when?
A. In April, I think.
Q. Were you on board all the time the cargo was coming on board at Matanzas?
A. Yes, sir.
Q. Come in lighters?
A. Yes.
Q. What condition did it appear in?
A. All right; of course a few bags stained.
Q. Any signs of sea water?

A. The bags were stained, and of course, those that were stained we gave receipts for accordingly.

Q. Was the cargo weighed down there?

A. No, sir.

Q. Did the bags seem to be slack?

A. Some slack bags and some stained; and of course the receipts were given according to their condition as they came in.

Q. How many slack bags?

A. You would have to get the receipts to find out. I am handling cargoes every day of my life, and can't remember so long.

Q. How many stained?

A. I couldn't tell that.

Q. It was a pretty good looking cargo as it came aboard?

A. Yes.

Q. What kind was it?

A. Brown sugar.

Q. It turned out pretty bad here?

A. Yes.

Q. Where was it discharged in Philadelphia?

A. It was some sugar refining company. We ran alongside the wharf.

42 Q. Were the damaged bags put in a separate pile?

A. Yes.

Q. How many were there?

A. I don't know.

Q. How big a pile? I suppose there might be 800 or somewhere about that?

A. I couldn't tell.

Q. Did you say that four or five tiers were damaged in the 'tween-decks?

A. No; it was right across the ship, just in the port wing.

Q. How many tiers of bags of sugar were there in the 'tween-decks?

A. Would be about five or six altogether, where it was not stowed level along. There was even more in the after part.

Q. How many tiers were there in the lower hold?

A. I should judge there would be about 20 tiers. The lower hold is 18 feet deep; I suppose it would be about twenty tiers.

Q. What is the height of the 'tween-decks No. 2?

A. About 6 feet 9.

Q. You are positive you never had any passengers from the time you joined her in London until after this damage?

A. Yes.

Q. You kept the log of course?

A. Yes.

Q. When did you see it last?

A. As far as I remember about it, it went to Westergaard's in Philadelphia.

Q. Did you take it there?

A. The captain took it there.

Q. That is the last you saw of it?

A. Yes.

Q. Mr. Nicholson, have you ever seen a plan of this ship?
A. Yes, sir.
Q. Is there one on board?
A. Yes, I believe the captain has one.
Q. You had one when you were master?
A. It was not in my charge then. I saw it in London.
Q. Do you mean the builder's plan?
A. Yes. I don't think there is one on board.
Q. Just a plan for the loading of cargo?
A. Yes, we make one ourselves, for our own convenience.

Mr. BURLINGHAM: I ask that the claimant produce the builder's plan.

43 Redirect by Mr. KIRLIN:

Q. If the log is found, will the entries be in your handwriting?
A. All signed by me.
Q. Made out at the time?
A. Yes, day by day.
Q. Was there anything in the steerage that might have broken this port?
A. No, sir; nothing at all.
Q. Do you know whether there was anything the matter with the frames of these port lights or with this particular one?
A. The frames were all right.

Recross-examination by Mr. BURLINGHAM:

Q. Was this owner that you speak of in London when you joined the ship?
A. Mr. Tom Bowring is always in London. C. T. Bowring & Co. is only the name of the firm.
Q. Who is the managing owner of this vessel?
A. Mr. Tom Bowring, I suppose.
Q. Where does this ship hail from?
A. Liverpool. C. T. Bowring & Co. are the managers of her.
Q. Owned by a corporation?
A. Yes.
Q. What relation does this Bowring, of Bowring & Archibald, hold to the ship?
A. The same firm as C. T. Bowring & Co. in Liverpool and London.
Q. You came from London to St. Johns?
A. Yes.
Q. And you stayed on the ship all the rest of the time until now?
A. Yes.
Q. Has she been in dock or anywhere since?
A. Yes, sir; we have been in dock last about the beginning of May.
Q. When she started from Philadelphia for Tucacas were the owners in Philadelphia or any of them, or any representatives of them?
A. Oh, no.

Q. Were any of the owners in Matanzas when she started from there?
A. No, sir.
Q. Any work done on her in Matanzas?
A. No, sir; no work done from shore. Of course the usual work done aboard the ship.

44 HENRY SHOTELL, being duly sworn, testifies:

Examined by Mr. KIRLIN:

Q. Were you carpenter on the *Silvia* on the voyage from Matanzas to Philadelphia, when the port was broken and some sugar was damaged?
A. Yes.
Q. Do you recollect when you finished loading in Matanzas on that voyage?
A. No, sir.
Q. Do you recollect whether it was morning or evening?
A. I believe it was forenoon.
Q. Do you recollect when you started on the voyage?
A. No, sir.
Q. Did you go down in the steerage and see whether the ports in the steerage were closed or not before the vessel sailed?
A. Yes, sir; I had orders to go all round.
Q. Did you?
A. Yes.
Q. Did you go in the steerage?
A. Yes, sir.
Q. When did you do that, before the vessel sailed?
A. Oh, yes.
Q. Who was in there with you?
A. Nobody.
Q. Did you see the mate in there, Mr. Nicholson?
A. No, sir.
Q. At any time before you sailed?
A. The mate was down the holds during the loading.
Q. What did you do when you were in the steerage, with regard to these ports?
A. See that they were all closed.
Q. Did you look at them, or examine them with your hands?
A. Yes, sir; I must do that all times, with my hands and my eyes.
Q. Are you able to say whether this front starboard port in the steerage was shut and fast when the vessel sailed or not?
A. Yes, sir.
Q. Who shut it?
A. I shut it. They were all fastened and shut; screwed up.
Q. Did you help batten down the hatches?
A. I always do that myself.
Q. How long was it before you battened down No. 1 hatch, that you closed this port?

45 A. After they finished the cargo; I could not state the time. I got orders then from the chief officer to batten down the hatches.

Q. It was on the same day, was it?

Objected to as leading.

A. It must be on the same day, because we sailed the next day.

Q. How thick was the glass in that port?

A. $\frac{5}{8}$

Q. Did you measure it?

A. I have got the measure of this glass; yes, sir.

Q. Did you find it broken after that, any time on the voyage? After you examined it in Matanzas, did you at any time during the voyage to Philadelphia find it broken?

A. No, sir.

Q. Wasn't it broken on the voyage to Philadelphia?

A. Oh, yes, sir.

Q. How long after you sailed from Matanzas was it that you found it broken?

A. I don't know about the time; but it was next day or two days after.

Q. Who was the first one to see the port after it was broken? Who was the first one in the steerage, after the water was found in there?

A. The chief engineer and myself.

Q. When you went in there, did you see any water coming in the port?

A. No, sir; not at that time, the ship was eased down.

Q. Describe the appearance of the port, when you went in the steerage, after it was broken?

A. The rim was fast, the port was secured, and there was simply a few fragments of glass in the frame.

Q. Did you find any glass on the floor in the steerage?

A. A little.

Q. Was there much water in the steerage?

A. Not at that part; the water was in the after end.

Q. What did you do to keep any more water from coming in?

A. We closed the cover over it; closed shutter.

Q. Did you close any of the other shutters?

A. No, sir.

46 Q. When did you repair this glass?

A. After we got the weather moderated.

Q. What was done with the shutter after you repaired the glass?

A. Left it open.

Q. Was the shutter left open after that?

A. Yes.

Q. How long have you been with the ship?

A. Three years.

Q. What has been the practice about leaving the shutters open or shut?

Objected to.

A. The shutters as a rule are always open.

Cross-examination by Mr. BURLINGHAM:

Q. When were these ports cut in the steerage?

A. Some of them were there all the time, and there was a few others put there again afterwards, when the steerage was put there. There was no steerage there before.

Q. You used to put cargo in that number 1 'tween-decks?

A. Yes.

Q. How many ports were in there then?

A. Two ports.

A. One on each side?

A. There are three on each side now.

Q. You said at the time that you used it for cargo. I asked you how many there were then?

A. Two on each side. Then when in London they fitted the place up as a steerage; they cut an extra port on each side.

Q. Was that the forward or after one?

A. The forward.

Q. This one that was broken?

A. Yes.

Q. And was that put there just previous to sailing from London?

A. Yes, sir; about a week or two.

Q. Where was it done; while she was lying at her moorings?

A. Done in dry dock.

Q. Iron masters came and did it?

A. Yes.

Q. Did they make an inside shutter or dummie for those two new ports?

A. They are already cast for them.

47 Q. So all they have to do is to put them on the inside?

A. Yes.

Q. And were there such dummies before, on the other ports in the 'tween-decks No. 1 or steerage?

A. Yes.

Q. And how is it in No. 2 'tween-decks?

A. The same, sir.

Q. It is only in the forecastle that they have not got dummies?

A. In some they have, and others they have not.

Q. But in the rest of the ship they have dummies?

A. Yes, all but a few in the forecastle and the cabin or saloon.

Q. But wherever there is a place to carry cargo in that ship, there are shutters or dummies on the inside of all the ports?

A. Yes.

Q. Now, did you have general orders to see that those ports were shut, or was it just what you were expected to do every time the ship left port?

A. It was just what I expected to do, and do at all times.

Q. You don't mean to say that the first officer said: Carpenter, go down and see if the ports are all right. Did he say those words to you?

A. Yes.

Q. You went down there, you don't know when it was, but was the cargo all in?
A. No cargo in the 'tween-deck.
Q. Were they still taking on cargo from the lighters?
A. No, sir.
Q. And you took a look at all those ports?
A. Yes.
Q. And did you try them with your hand?
A. Yes, each one.
Q. Sure of that?
A. Yes.
Q. Because you always do?
A. Yes, sir.
Q. You were not afraid that those ports would be stove in, were you?
A. Of course anything like that I can't always think about.
Q. You have followed the sea how many years?
A. About August, seventeen years.
Q. You have often heard of port lights being stove in?
A. Yes, sir; I heard of it.

Q. Now, you say that you went down there and you found
48 some of the glass still in the frame; how much of it?

A. A little stuck to the putty. They are all put in with white lead and putty.
Q. Just a very little round the rim?
A. Not much; most of it was out.
Q. Had the glass come in or gone out; could you tell?
A. That I can't say. From the fragments of glass on the deck, I think the glass had come in.
Q. Was it all there?
A. That I couldn't say.
Q. Before that you said a very little was there?
A. I couldn't say how much was there.

Redirect by Mr. KIRLIN:

Q. Was the frame injured in any way; the frame of the port?
A. No, sir; the frame was perfectly tight.
Q. Was it screwed up?
A. Yes; the same as it had been.

Recross-examination by Mr. BURLINGHAM:

Q. Isn't it true that after that the shutters in that steerage were shut on the way up to Philadelphia; after you put the glass in?
A. No, sir.
Q. You think they were open?
A. Yes, sir.

WILLIAM CUTTHILL, being duly sworn, testifies as follows:

Examined by Mr. KIRLIN:

Q. You are the second engineer on the *Silvia?*
A. Yes.
Q. Were you second engineer on the voyage from Matanzas to Philadelphia when this damage occurred?
A. Yes.
Q. What did you see on the day you sailed from Matanzas that indicated to you that there was water in No. 2 hold?
A. I didn't see anything whatever; not the day we sailed.
Q. When did you see it?
A. It was in the morning; I couldn't tell the day and date.
49 Q. Have you got your log?
A. No; the superintendent—the superintending engineer has it.
Q. You mean the chief engineer of the ship?
A. No.
Q. What is his name?
A. Mr. Davis.
Q. Where does he live; what is his address?
A. Care of Bowring & Archibald.
Q. Will your log show when you discovered water in the No. 2 hold?

Objected to.

A. I couldn't tell.
Q. What was the first indication of it?
A. The first was the water coming through the bunker doors.
Q. Where is it? Which side of the keel?
A. There is a bunker door on each side of the keel.
Q. Which door?
A. The port door.
Q. How far above the floor did you see the water?
A. The floor is about eight inches from the bottom of the bunker door. When the water got up to the bottom of the bunker door it came through.
Q. And what is the floor placed on?
A. On the top of a tank.
Q. And does that tank run right on the same level?
A. Yes.
Q. So that the floor of the No. 2 hold would be on the same level as the one you were standing on?
A. I had to remove the floor afterwards.
Q. What for?
A. When I cut this hole through to let the water in about 1½ inches in diameter.
Q. Whereabouts from the door?
A. A little to the port side from the door.
Q. And how high above the door?
A. I cut it as near to the floor as I could.

Q. How high would that hole be above the ceiling in the No. 2 hold?

A. Above the top of the floor in the No. 2 hold. I should say a couple of inches.

Q. Did anything come out when you cut the hole?

A. Yes, water.

Q. How long did it keep coming?

A. 24 hours.

50 Q. Come with much force?

A. Not much force, but it kept a man keeping it clear all the time.

Q. What stopped it?

A. It got that thick with molasses it couldn't run.

Q. When you saw this weeping in that door, did you start the pumps?

A. Yes; there was no water to pump out of it.

Q. Were the sluices open in the limbers?

A. Yes.

Q. Anything come out?

A. There was nothing in the limbers.

Q. Did any water come down into the limbers afterwards, in any noticeable quantity?

A. No.

Q. Or come out through this hole that you had cut?

A. I should say the most came out through there; we couldn't get anything out with the pumps.

Q. Are you going to sea with the ship?

A. Yes.

Cross-examination by Mr. BURLINGHAM:

Q. You discovered this water coming through the same day you left Matanzas, or the day after?

A. It was in the afternoon; about three o'clock.

Q. The same day you left Matanzas?

A. Yes, sir.

Q. When did you cut the hole; the same day?

A. Whenever I discovered it.

Q. Were you on watch that day?

A. I went on watch at four o'clock. This was about three.

Q. Were you on watch before that?

A. At 8 o'clock in the morning.

Q. How many hours?

A. Four.

Q. Eight to twelve?

A. Four to eight.

Q. Then you went on at twelve?

A. Went on at four in the afternoon.

Q. Were you turned in all that eight hours?

A. No, I always find something to do.

Q. Did you keep this log you have spoken of so many times?

A. I don't keep it; the chief engineer keeps it.
Q. This is a different chief now?
A. Yes.

51 LEONARD D. BARRETT, being duly sworn and examined as a witness for the libellant, testifies as follows:

By Mr. BURLINGHAM:

Q. What is your business?
A. I am an admiralty surveyor in Philadelphia.
Q. How long have you been in that position?
A. Going on 13 years.
Q. Appointed by the district court for the eastern district of Pennsylvania?
A. Appointed by Judge Butler as one of his assessors.
Q. Do you know the steamship *Silvia?*
A. Yes, sir.
Q. Did you go on board of her in February last?
A. Yes, sir.
Q. Where was she lying?
A. Lying at the Franklin refinery, pier 30 South wharves, Philadelphia.
Q. At whose request did you go?
A. At the request of the agent of the ship and with the consent of the sugar company who owned the ship.
Q. Who were the owners of the vessel?
A. L. Westergard & Co.
Q. How long have you been an inspector there in Philadelphia?
A. I have been in this court position for 13 years, nearly.
Q. Before that what was your business?
A. I was assistant surveyor to the British Lloyds.
Q. Did you ever follow the sea?
A. Yes, sir; for thirty years before that.
Q. Were you master of steamers?
A. Yes, sir; for 15 years.
Q. Trading where?
A. From Philadelphia to southern ports, New Orleans, Charleston, &c.
Q. Carried sugar?
A. Yes, sir.
Q. When you went on board what did you find?
A. The captain said he expected damage in No. 2 between-decks hold, and when we opened the hatch we found the damage at once; then we proceeded to find where the water came from that
52 caused the damage, and we traced it to a bull's-eye dead-light air port in the side of the ship which the captain said had been broken. It was on the starboard side, the fifth from the bow forward of the starboard forerigging.
Q. Had it been repaired?
A. Yes, sir, with a new glass.
Q. Could you see that?

A. Yes, sir, I see the putty was new.
Q. Were there shutters on the inside?
A. There was a metal shutter on the inside on a hinge.
Q. Did you see that cargo as it came out?
A. I frequently visited the ship as she was discharging.
Q. Tell us in a general way to what extent the damage reached.
A. The damage reached the whole length of No. 2 between-decks and overrun the coaming of the hatch into the lower hold and ran aft; the hatch that went into the lower hold; it was the hatch that went into the lower hold and followed along aft to the bulkhead.
By the COURT: Was there any sugar stowed amidships?
A. Yes, sir, the lower hold was full of sugar.
Q. But amidships?
A. The hatch was in amidships of the ship and the water ran right down—the port was in No. 1 and the hatch was in 2.

By Mr. BURLINGHAM:

Q. What was done with this damaged sugar?
A. It was laid out by itself, separated from the sound.
Q. In a general way how many bags were there?
A. 1,300 and some odd.

By the COURT:

Q. Did you see what the damage was caused by?
A. Yes, sir, it was caused by sea water entering through this broken port.

By Mr. BURLINGHAM:

Q. Were there any bags empty?
A. 20 bags were empty, yes, sir; about 700 of the 1,300
53 were quite slack, some half empty, some three-quarters empty and some one-quarter.
Q. Those damaged ones were separated from the sound?
A. Yes, sir.
Q. How did the rest of the cargo turn out?
A. In good condition, full weight.
Q. You have examined a great many steamships?
A. Yes, sir.

By the COURT:

Q. You said full weight?
A. The sound bags.
Q. What kind of sugar?
A. Centrifugal sugar; that is, crystal-ized grain sugar from the north side of Cuba, from Matanzas.

By Mr. BURLINGHAM:

Q. You say you have examined a great many steamships?
A. Yes, sir.
Q. Was there anything peculiar about the construction of the lights of this vessel; the side ports?

A. They were all supplied with inside shutters.
Q. What are they for?

Mr. Kirlin objects on the ground that it doesn't appear that he has any knowledge of what those shutters were for.

By the COURT:

Q. Did you ever know anything about shutters to ports?
A. Yes, sir; I have been in a great many ships.

By Mr. BURLINGHAM:

Q. How many steamships have you been in?
A. I suppose ten steamships and towboats.
Q. What was the advantage of the shutters?
A. To protect the glass, in case the glass should break, to prevent the water from coming into the hold.

By the COURT:

Q. Can you tell me what is the comparative strength of those inside dummies?
A. They are called blind on the ship; they are frequently called blind ports.
54 Q. Can you tell me what is the comparative strength of those inside dummies with the plates of the ship?
A. They would be equally strong as the plates.

By Mr. BURLINGHAM:

Q. Do you know anything about the custom of shutting those dummies at sea?
A. Yes, sir; they are always shut in the cargo space, especially in the winter months in the North Atlantic in any well-regulated ship.

Cross-examined by Mr. KIRLIN:

Q. Did you count the bags that were damaged yourself?
A. No.
Q. Your statement as to the number of bags is given from information received by you?
A. All excepting the empty ones, those I counted.
Q. As to the rest you have no knowledge?
A. I have a very good verified statement.
Q. You didn't take the weight, I suppose?
A. No, sir; but I followed the weights up in the same manner.
Q. You didn't weigh them yourself?
A. No, sir.
Q. Your statement as to the weights is from information also?
A. Yes, sir.

Libellant rests.
Testimony closed.

55 Form "B."

J. H. Winchester & Co.,
60–62 New street,
New York.

Cable address:
"Winchester."
Watkins' Code
and Appendix
Scott's Code.

Marked for identification CLAIMANT'S EXHIBIT A, NOV. 1, 1894.

Steam.

Cuba—United States.

This charter-party, made and concluded upon in the city of New York, the 31st day of January in the year of our Lord one thousand eight hundred and ninety-four.

Between Red Cross Line owners of the steamship *Silvia* of —— of the burden of 1,104 tons, or thereabouts, net register measurement, classed 100 A1 at British Lloyds of the first part, now at Tucacas, Ven., and is to proceed as soon as possible in ballast as soon as discharged to Matanzas, Cuba, to enter on this charter, and J. H. Winchester & Co., agents for charterers of the second part.

Witnesseth, that said party of the first part agrees on the chartering and freighting of the whole of the said vessel (with the exception of the deck, cabin and necessary room for the crew and storage of provisions, sails, cables and fuel), or sufficient room for the cargo hereinafter mentioned, unto said party of the second part, for a voyage from Matanzas, Cuba, to Philadelphia, New York or Boston, or so near thereunto as she can proceed and always float with safety, on the terms following: The said vessel shall be tight, staunch, strong and in every way fitted for such a voyage, and receive on board, during the aforesaid voyage, the merchandise hereinafter mentioned (the act of God, adverse winds, restraint of princes and rulers, the Queen's enemies, fire, pirates, accidents to machinery or boilers, collisions, errors of navigation, and all other dangers and accidents of the seas, rivers and navigation, of whatever nature and kind
56 soever during the said voyage always excepted). The said party of the second part doth engage to provide and furnish to the said vessel a full cargo, under deck, of sugar in bags.

The bills of lading to be signed without prejudice to this charter, and any difference to be settled before vessel sails; if in favor of vessel, in cash at current rate of exchange less insurance; if in charterer's favor, by draft of captain upon his consignees, payable ten days after arrival of vessel at port of discharge, and to pay to said party of the first part, for the use of said vessel during the voyage aforesaid.

To Philadelphia (12) twelve cents per 100 lbs. net, invoice weight for sugar in bags.

To New York (11) eleven cents per 100 lbs. net, invoice weight for sugar in bags.

To Boston (13) thirteen cents per 100 lbs. net, invoice weight for sugar in bags.

Charterers have privilege of sending vessel to Delaware break-

water for orders at 1 cent per 100 lbs. on bags additional. Freight payable in cash, free of discount or interest, on right delivery of cargo.

Captain to telegraph consignees immediately, his arrival at Delaware breakwater, and orders to be given within 24 hours after receipt of notice of steamer's arrival or lay days to count.

(6) Six working lay days are to be allowed to the said merchants (if the vessel is not sooner dispatched) for loading the vessel to be reckoned from the day after the captain reports, and the vessel is ready to receive cargo (time employed in shifting ports not counting) until her day of dispatch, and to be discharged with customary quick dispatch at the port of discharge.

And that for each and every day's detention by default of said party of the second part, or agent, eight pence sterling per net register ton, per day, day by day, shall be paid by said party of the second part, or agent, to said party of the first part.

Steamer to have liberty to tow and be towed and to assist vessels in all situations, also to call at any port or ports for coals and *or* other supplies.

57 The cargo or cargoes to be received and delivered alongside of the vessel, where she can load and discharge, always safely afloat within reach of her tackles, and lighterage, and also extra lighterage, if any, at the risk and expense of cargo.

Vessel to be loaded by stevedores appointed by the charterers, or their agents, at customary rates, and charterers' agents to appoint stevedore to discharge cargo; if New York, at the rate of 3½c. per bag; if Philadelphia or Boston, according to the custom of the respective port, and at such wharf as they may designate, where the vessel may safely lie. Charterers to have the privilege of a second discharging berth, by paying towage.

Charterers' responsibility to cease when cargo is all on board and bills of lading signed, but master or owners to have an absolute lien on cargo for freight, dead freight or demurrage.

Cash sufficient for vessel's ordinary disbursements, if desired by the master, to be advanced by charterers, or their agents at port of loading, subject to usual charges for interest, commission and insurance.

Lay days, if required, not to commence before the 5th February, 1894. Charterers have privilege of cancelling charter should steamer not be at loading port ready for cargo on or before 12th February, 1894. An address commission of 2½ per cent. on the amount of freight is due on signing of this charter-party, ship lost or not lost, to Bowring & Archibald, by whom or their agents vessel's business is to be attended to at port of discharge, on customary terms.

To the true and faithful performance of all and every of the foregoing agreements, we, the said parties, do hereby bind ourselves, our heirs, executors, administrators and assigns, each to the other, in the penal sum of estimated amount of freight earned under this charter.

58 In witness whereof, we hereunto set our hands, the day and year above written.

(Signed) BOWRING & ARCHIBALD,
Agents Red Cross Line.
J. H. WINCHESTER & CO.,
Agents for Charterers by Cable Authority from Havana.

Signed in the presence of—
(S'g'd) L. S. RICHARDS.

We certify the above to be a true copy of the original charter-party in our possession.

J. H. WINCHESTER & CO.

CLAIMANT'S EXHIBIT B, NOV. 1, 1894, FOR IDENTIFICATION.

(Cut of ship.)

H 13227 bags sugar.

Cuba.

Shipped in good order and well conditioned by Dubois & Co. by order of Mess. Hidalgo of Havana on board the S. S. called *Sylvia* whereof Clark is master now lying in the port of Matanzas, and bound for Philadelphia to say: thirteen thousand two hundred and twenty-seven bags centrifugal sugar weighing net 4,267,878 lbs. being marked and numbered as in the margin and are to be delivered in the like good order and condition at the port of Philadelphia (the dangers of the seas only excepted) unto the order of the American Sugar Refining Co. or to their assigns; he or they paying freight for the said sugar at the rate of (12c.) twelve cents U. S. currency per every 100 lbs. net invoice weight and all other conditions as per charter-party dated New York 31st January 1894 without primage and average accustomed. In witness whereof the master or purser of the said vessel hath affirmed to five bills of lading, all
59 of this tenor and date; one of which being accomplished, the other to stand void.

Dated in Matanzas the 15th day of February, 1894.
Weight and contents unknown.

JOSEPH CLARK.

(Endorsed on back:) Received from Mess. Dubois & Co. for account of Mess. Hidalgo & Co. of Havana the sum of eight hundred and forty-three $\frac{85}{100}$ dollars in U. S. currency, which amount is to be deducted from the within freight free of all charge. Matanzas, February 15th, 1894. Joseph Clark, master. $843.85 U. S. c'y.

CLAIMANT'S EXHIBIT C, NOV. 1, 1894, FOR IDENTIFICATION.

UNITED STATES OF AMERICA, } ss:
State of Pennsylvania, City of Philadelphia, }

By this public instrument of declaration and protest, be it known and made manifest to all whom it may concern, that on the 21st

day of Feb'y, in the year of our Lord one thousand eight hundred and ninety-four before Arnold Katz, personally appeared Joseph Clark, master of the steamer *Silvia*, of Liverpool, of the burden of 1,104 tons, or thereabouts, and noted with him in due form of law, his protest for the uses and purposes hereinafter mentioned. And now, on this day, to wit, the day of the date hereof, before me Arnold Katz, a notary public in and for the Commonwealth of Pennsylvania, duly commissioned and sworn, residing in the city of Philadelphia, comes the said master, and requires me to extend his said protest, and together with him come and appear Joseph Nicholson, mate; Henry Shotel, carpenter, Henry Allen, and Henry Efford Allen, seamen all belonging to the aforesaid vessel, all of whom being by me severally, duly and solemnly sworn, voluntarily and freely depose and say that the said vessel laden with a cargo of sugar being in every respect seaworthy, and in all things
60 fitted and provided for her intended voyage, sailed on the 16th day of February, 189–, from Matanzas bound to Philadelphia.

Feb'y 12, '94.—Commenced loading which continued until Feb'y 16th, '94. When at 6 a. m. proceeded under charge of pilot. At 6.30 dismissed pilot. 10 a. m. strong breeze with heavy head sea, ship laboring and pitching heavily and shipping heavy water over all. At 3 p. m. second engineer reported water draining through bulkhead doors into stoke-hold. Called all hands and took off No. 1 and 2 hatches and found that the sea had broken the glass in the forward port on starboard side of the steerage which port was located near the bluff of the bow, the frame was securely fastened but glass gone. Found the water apparently draining from them along No. 2 between-decks into No. 2 lower hold and about 12 inches water in after part of steerage. Commenced bailing with buckets from steerage and kept pumps going on forward bilges continually. 5 p. m. opened sluices. On the previous day when making ready for sea an examination was made of all ports and same found in good order and secure. It was also found that the sea broke one of the ventilator flanges about the same time when the broken port was found, also funnel flanges for forecastle. Carpenter covered same with wood and canvas.

Feb. 17th.—Same weather 1 a. m. No. 2 tarpaulin damaged by seas. At 4 a. m. gale slightly moderating but still shipping heavy seas and pitching badly. Pumps, tanks, etc. attended to and pumps going continually on forward bilges.

Feb. 18th.—Moderate weather. No work done except by carpenter who put new glass in the burst steerage port as the dummy was leaking slightly.

Feb. 19th and 20th.—Moderate weather, nothing worthy of note occurring until 10.25 p. m. on the last-named day, when took pilot on board off the breakwater and proceeded up the river.

Feb'y 21st.—At 5.20 a. m. anchored off Quarantine sta-
61 tion. At 7 a. m. received pratique and proceeded to Phila. and came to anchor.

Feb'y 22d.—Received orders for docking. Hove up anchor and

proceeded for wharf and at 4.30 p. m. moored safely, being assisted into berth by tugs.

Feb'y 23rd.—Commenced discharging.

And the said deponents on their oaths declare, that the said vessel was, at the commencement of the voyage aforesaid, tight, staunch and strong, well manned, victualled and equipped, and had her cargo well and sufficiently stowed, and her hatches properly closed and secured; and that during the said voyage they, together with the rest of the crew on board, used their utmost endeavors to preserve the said vessel and her cargo, tackle and apparel from damage or injury. And that any loss, damage or injury which has arisen or accrued, or that may arise or be sustained, in any way or manner whatever, is solely owing to the accidents and difficulties herein set forth and declared, and not to any negligence, want of skill, vigilance or exertion on the part of the deponents, or any of the officers or crew of the said vessel.

(Signed) Master, JOSEPH CLARK.
1st mate, JOSEPH NICHOLSON.
Carpenter, H. SHOTEL.
Seamen, { H. ALLEN. / HENRY EFFORD ALLEN.

Whereof, the said master, as aforesaid, hath requested me to protest, and I, the said notary, at such his request have protested, and by these presents do publicly and solemnly protest, against all and every person or persons whom it doth, shall or may concern, and against all and singular the accidents, casualties and circumstances already set forth in the foregoing declaration, on oath, for all manner of losses, costs, damages, charges, expenses and injuries whatsoever, which the said vessel and her cargo on board and the freight by her earned, or to be earned, or either of them or
62 any part thereof, have already sustained, or may hereafter sustain, by reason or means of the foregoing premises.

Thus done and protested in the city of Philadelphia this 28th day of February, in the year of our Lord one thousand eight hundred and ninety-four.

[SEAL.] In testimony whereof, I have hereunto set my hand and affixed my notarial seal.

(Signed) ARNOLD KATZ,
Notary Public.

STATE OF PENNSYLVANIA, } ss.:
City of Philadelphia, }

I, Edward P. Greene, of the city of Philadelphia, a public notary in and for said city, duly commissioned and sworn, do certify the foregoing to be a true and exact copy of an original protest made before Arnold Katz.

In testimony whereof, I have hereunto set my hand and notarial seal this first day of October, one thousand eight hundred and ninety-four.

EDWARD P. GREENE,
Notary Public.

63 United States District Court, Southern District of New York.

FRANKLIN SUGAR REFINING COMPANY
vs.
THE STEAMSHIP "SILVIA."

In admiralty—loss of sugar.

Wing, Shoudy & Putnam and Mr. Burlingham, for libellant.
Convers & Kirlin, for claimant.

BROWN, *J.*:

On the delivery of the libellant's consignment of sugar by the steamship *Silvia* in Philadelphia in February, 1894, a quantity of sugar was found to have been damaged by sea water which had got into the ship through a glass port light, broken during the voyage. The port was supplied with a proper iron cover or dummy, which, however, was not closed or made fast at the time of sailing, although the hatches leading downward into that compartment were battened down. This, in my judgment, was negligence on the part of the ship, for which she would have been held liable but for the provisions of the act of Congress passed February 13, 1893 (27th Stat., ch. 105, p. 445; 2d Supp. Rev. Stat., ch. 105, p. 81), which, by section 3, provides:

"That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped and supplied, neither the vessel, her owner or owners, agent or charterers shall be-
64 come or be held responsible for damage or loss resulting from faults or errors in *navigation* or in the *management of said vessel.*"

For the libellant it has been contended that the ship was not in a seaworthy condition on sailing, by reason of the fact that the covers of the glass ports were not properly closed, while the hatches were battened down so as to prevent ordinary access or observation of the compartment in any change of weather. There is no evidence, however, nor can I assume, that these iron covers or dummies were not of the ordinary kind, and sufficient to prevent the breaking of the glass in the ports and the ingress of water to an amount beyond what the scuppers would clear had the covers been properly closed. In supplying the usual iron covers the owners had "used due diligence to make the ship seaworthy" as regards these ports, and fulfilled their obligations in this regard under the act of February 13, 1893, so as to bring themselves within its protection. Although the ship sailed from Matanzas not in a seaworthy condition, from the fact that the hatches were battened down without the closing of the iron coverings of the ports, that was not the owner's fault. The duty to close the iron shutters to prevent the breakage of the glass and the ingress of sea water was a duty belonging to the "management of the vessel;" and the omission to close them was a "fault or error in the management of the vessel" within the lan-

guage of the act. The omission was a fault of precisely the same nature as the omission to put on hatch covers would have been in a rough sea. By the supply of proper ports, proper glasses, and proper iron covers for the ports, as in the supply of proper hatch covers, the owner's duty of "due diligence" is fulfilled; and if the officers of the ship, either at the moment of sailing, or afterwards, omit to make use of the things supplied to put or keep the ship in a proper seaworthy condition for meeting the perils of the seas from
65 time to time, such an omission seems to me purely a fault "in the navigation or management of the vessel," for which the owner is not responsible under the recent act.

The case is quite like that of Hedley *vs.* Steamship Co. (1892), 1 Q. B., 58; (1894), App. Cas., 222, where a seaman in a heavy lurch of the ship was thrown overboard and drowned, because the stanchions and rails, properly supplied for the ship by the owners, had not been set in place on the starboard side as they ought to have been set on the departure of the ship. The administratrix sought to recover damages of the owners. In the decision of the case both in the court of appeals and in the House of Lords, two points were adjudged: first, that the master's neglect to set the stanchions and rails was the negligence of a fellow-servant in the navigation of the ship, for which the owners were not liable at common law; second, that under the provisions of the merchants' shipping act, which was equally stringent with our own act, as respects the obligations of the owner to make and keep the ship seaworthy, the supply of all the usual and proper equipment was a full compliance with the act by the owner in respect to the stanchions and rail, and that the "fault was in not making use of the equipment with which the ship had been furnished." (1894), App. Cas., 228. This seems to me precisely applicable to the act of Congress of February 13, 1893; and upon that ground the libel must be dismissed; but as the question is a new one, without costs.

Dated New York, November 23, 1894.

66 At a stated term of the United States district court for the southern district of New York, held at the United States court-rooms, in the city of New York, on the 1st day of December, 1894.

Present: Honorable Addison Brown, district judge.

FRANKLIN SUGAR REFINING COMPANY, Libellant,
vs.
THE STEAMSHIP "SILVIA;" RED CROSS LINE, Claimant.

This cause having come on to be heard upon the pleadings and upon the proofs adduced by the respective parties, and having been argued by the advocates for the respective parties, and due deliberation being had, it is now, on motion of Convers & Kirlin, proctors for claimant,

Ordered, adjudged and decreed, that the said libel be and the same hereby is dismissed, but without costs. On the like motion, it is further

Ordered that unless an appeal be taken from this decree within the time prescribed by the rules and practice of this court, that the claimant's stipulation for costs and value be canceled of record.

ADDISON BROWN.

(Endorsed:) Final decree. Filed December 1, 1894.

67 District Court of the United States, Southern District of New York.

FRANKLIN SUGAR REFINING COMPANY, Libellant and Appellant,
against
THE STEAMSHIP "SILVIA," HER ENGINES, ETC.; RED CROSS LINE, Claimant and Appellee.

SIRS: Take notice that the libellant above named hereby appeals to the United States circuit court of appeals for the second circuit, from the final decree entered herein December 1st, 1894.

Dated New York, December 3d, 1894.

WING, SHOUDY & PUTNAM,
Proctors for Libellant and Appellant.

To Samuel H. Lyman, Esq., clerk; Messrs. Convers & Kirlin, proctors for claimant.

(Endorsed:) Notice of appeal. Filed December 11, 1894.

68 United States Circuit Court of Appeals for the Second Circuit.

THE FRANKLIN SUGAR REFINING COMPANY, Libellant and Appellant,
against
THE STEAMSHIP "SILVIA," HER ENGINES, ETC.; RED CROSS LINE, Claimant and Appellee.

The libellant assigns as error in the decision of the district court of the United States for the southern district of New York herein:

1. That said court relieved the steamship *Silvia* from liability for damage caused by negligence.

2. That said court relieved said vessel from liability, although it found as a fact that she sailed from Matanzas in an unseaworthy condition.

3. That said court applied to a foreign vessel the provisions of the act of Congress of February 13, 1893, chapter 105 of the Laws of 1893.

4. That said court applied said act of Congress to a British vessel so as to exonerate her owners from liability for acts of negligence and unseaworthiness which arose within a foreign territory, to wit: the island of Cuba.

5. That said court held the omission of those in charge of said ship to close the iron shutters or dummies inside the port lights to be "a fault or error in navigation, or in the management of said vessel," under section 3 of said act of February 13th, 1893.

6. That said court found that the owners of said steamship
69 *Silvia* used due diligence to make the ship seaworthy.

7. That said court dismissed the libel.

8. That said court did not make a decree in favor of the libellant.

WING, SHOUDY & PUTNAM,
Proctors for Appellant.

(Endorsed:) Assignment of errors. Filed December 28, 1894.

70 UNITED STATES OF AMERICA, } ss:
Southern District of New York, }

THE FRANKLIN SUGAR REFINING COMPANY, Libellant and Appellant,
vs.
THE STEAMSHIP "SILVIA," HER ENGINES, ETC.; RED CROSS LINE, Claimant and Respondent.

I, Samuel H. Lyman, clerk of the district court of the United States of America, for the southern district of New York, do hereby certify that the foregoing is a correct transcript of the record of the district court in the above-entitled cause made up pursuant to rule No. 4 in admiralty of the United States circuit court of appeals, for the second circuit.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, this 29th day of January, in the year of our Lord one thousand eight hundred and ninety-five, and of the Independence of the said United States the one hundred and nineteenth.

[SEAL]

SAM'L H. LYMAN, *Clerk.*

71 U. S. Circuit Court of Appeals, Second Circuit.

FRANKLIN SUGAR REFINING COMPANY, Appellant,
vs.
THE STEAMSHIP SILVIA, Appellee.
} Opinion.

WALLACE, *Circuit Judge:*

The cargo for the injury for which this suit was brought was shipped at Matanzas for Philadelphia under a bill of lading which provided for the delivery in good order and well conditioned, "the dangers of the seas only excepted." It was injured by sea water which came through a port in one of the compartments of the between-decks which had been recently fitted up to carry steerage passengers, but which at the time was only used for the storage of ropes and extra gearing. The port was one of several in the compartment, was of the diameter of eight inches, was furnished with a heavy glass cover set in a brass frame, and also with an extra cover of iron, and was eight or nine feet above the water when the

vessel was deep laden. When the steamship left Matanzas the weather was fine, none of the ports of the compartment were closed otherwise than by the glass cover, and the hatch, which was the only entrance to the compartment, was battened down. After getting out to sea rough weather was encountered, and soon after, and when the steamship had been six or eight hours on her voyage, it was found that water was entering the engine-room. An investigation ensued which resulted in ascertaining that the glass cover of one of the ports was broken and the water had entered in consequence. Whether the cover was broken by the force of the
72 seas, or by floating timber, or a piece of wreckage, was wholly a matter of conjecture. The officers of the vessel regarded the glass covers as strong enough to resist ordinarily heavy seas, and seem to have left the iron covers unclosed intentionally upon the present voyage, in order that the compartment might be light in case it became necessary to visit it. In every other respect, save that when she sailed the iron shutters were not fastened over the ports, the vessel was tight, staunch and fit for the voyage.

The learned district judge who heard the cause in the court below was of the opinion that the steamship was not in a seaworthy condition at the beginning of her voyage, but that her owners had used due diligence to make her so, and consequently that she was exonerated from liability for the injury to the cargo by the provisions of the act of Congress of February 13, 1893, relating to navigation of vessels, commonly known as the Harter act.

We are of the opinion that the steamship was not unseaworthy when she began her voyage. Granting that the glass covers were not a sufficient protection for the ports in rough weather, they were adequate for fair weather, and it would have been but the work of a few moments to unbatten the hatch of the compartment and close them with the iron covers. In the state of the weather during the first few hours of the voyage there was no necessity for closing the ports with the iron covers, none even for closing them with the glass covers; and it can hardly be imagined that a storm would be encountered without premonitions which would afford ample time for access to the compartment and for fastening the iron covers. The case of Steele *v.* State Line (3 App. Cas., 72) is quite in point. In that case a cargo of wheat was damaged by sea water entering a port about a foot above the water line, owing to the insufficiency of the fastenings. The special finding of the jury did not state whether the insufficient fastening of the port happened before starting on the voyage or afterwards. The bill of lading contained the usual negligence exemptions, which was sustained in the
73 court below, where judgment was given for the defendants. On appeal it was held that the judgment must be reversed and the cause remanded for a specific finding as to whether the port was insufficiently fastened when the steamer sailed, and, if so, whether the cargo was so stowed with reference to the port that it could not be readily closed on short notice, on the approach of storm. Lord Blackburn expressed the opinion that if the port was in a place where it would be in practice left open from time to time,

but was capable of being speedily shut if occasion required, the vessel could not be said to be unfit to encounter the perils of the voyage; that if when bad weather threatened it was not shut, that would be negligence of the crew and not unseaworthiness of the ship.

If the steamship was seaworthy, she was nevertheless liable for the loss, notwithstanding the exception against dangers of the seas in the bill of lading, if those in charge of her navigation were negligent in not causing the port to be sufficiently secured after the steamship got out to sea, unless the act of Congress relieves her. Whether they were justified in supposing that there could be any reasonable apprehension of risk from a port so small and so high above the water line as this, protected as it was by a glass cover of such thickness, is a question of fact in respect to which different minds might differ. Assuming, however, that they were not, and they were negligent in not putting on the iron cover, we think the case is controlled by the act of Congress, and that its provisions relieve the steamship from liability. Section 3 of that act provides that, "if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped and supplied, neither the vessel, her owner or owners, agent or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel, nor shall
74 the vessel, her owner or owners, charterers, agent or master be held liable for losses arising from dangers of the sea or other navigable waters."

It is perfectly obvious from the language of this act that Congress intended to relax the severity of the obligation imposed on the ship-owner as a carrier of goods by the pre-existing law as it had been declared by the courts. It had long been determined that in every contract for the carriage of goods by sea there is an implied warranty that the vessel is seaworthy at the time of beginning her voyage, unless this is superseded by some express condition in the contract. The very term warranty imports an absolute undertaking that the fact is as represented; and it was the settled meaning of the term as implied in contracts of affreightment or of insurance that it is an undertaking by the ship-owner not only that he will exercise due diligence to have the vessel seaworthy, but that she shall really be so. "If there should be a latent defect in the vessel, unknown to the owner and not discoverable upon examination, yet the better opinion is that the owner must answer for the damage caused by the defect." 3 Kent, 205. Modern adjudications affirm this proposition in the strongest terms and declare the implied warranty to be an absolute undertaking, not dependent on the owner's care or negligence, that the ship is in fact fit to undergo the perils of the seas, and other incidental risks, covering latent defects not ordinarily susceptible of detection as well as those which are known or are discoverable by inspection. The *Edwin I. Morrison* (153 U. S., 199); the *Caledonia* (157 U. S., 124). It has also always been

the law that the exemption of the dangers of the seas in the bill of lading or other contract of affreightment does not exonerate the ship-owner from responsibility for injury to the goods which results from a breach of his implied obligation to provide a seaworthy vessel. Thus the carrier was responsible for a loss produced by the dangers of the sea, if it was one which would not have happened except for the concurrence of some unknown and undiscoverable defect in the equipment of the vessel, which defect, because it was not
75 discoverable, could not be remedied. In the place of this responsibility the act of Congress substitutes a less stringent one by declaring that if the owner shall exercise "due diligence" to make the vessel in all respects seaworthy, neither he nor the vessel is to be responsible for damages or loss in transporting merchandise resulting from "faults or errors in her navigation or management," nor for losses arising from dangers of the sea. Other sections of the act emphasize the meaning of the particular section. Sections 1 and 2 prohibit carriers from relieving themselves by contract from the obligation of exercising "due diligence to make their vessels seaworthy" or from liability for loss or damage to cargo arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery; but it does not prohibit them from displacing by contract the warranty of seaworthiness or their responsibility as insurers of cargo. Read as a whole the purpose of the act manifestly is, on the one hand, in the interests of the public to prevent carriers from evading responsibility to exercise due diligence in providing seaworthy vessels and in the handling and care of the cargo, and, on the other hand, whenever they have exercised due diligence in these respects, to absolve them from liability for losses arising during the transit from the perils of the sea and from faults or errors in the navigation or management of vessels.

Doubtless the act does not prevent the carrier from waiving by contract with the cargo-owner those provisions which relax his ordinary obligations. He may do so by a charter-party or bill of lading containing an express warranty of seaworthiness, or by a foreign contract with the provision that it shall be governed by the law of the place of the contract. But his responsibility to a cargo-owner who sues in the courts of this country cannot be curtailed in any of the particulars prohibited by the act, and he is entitled to the benefits of the less rigorous liability which is substituted in place of his liability as an insurer.

76 It has been urged that section 3 is not intended to apply to foreign vessels, but the argument finds no support in the language of the section; and the intention to subject foreign vessels to a measure of responsibility which is, as to domestic vessels, regarded by the act as too severe, ought not to be unnecessarily imputed to Congress.

In the present case the vessel-owners certainly did exercise due diligence to make the vessel seaworthy, and if the failure to fasten the port with its iron cover was in any sense a fault or negligent omission, it was one in the management of the vessel committed by

those in charge of her navigation after she had started on her voyage.

For these reasons, we conclude that the district court properly dismissed the libel, and that the decree should be affirmed with costs.

(Endorsed:) U. S. cir. ct. of appeals, second cir. Franklin Sugar Refining Company, appellant, *v.* The Steamship *Silvia*, appellee. Opinion Wallace, C. J. United States circuit court of appeals, second circuit. Filed May 28, 1895. James C. Reed, clerk.

76½ At a stated term of the United States circuit court of appeals, for the second circuit, held in the United States court-rooms in the post-office building, in the city of New York, on the — day of June, 1895.

Present: Hon. William J. Wallace, Hon. E. Henry Lacombe, Hon. Nathaniel Shipman, circuit judges.

FRANKLIN SUGAR REFINING COMPANY
against
THE STEAMSHIP "SILVIA."

The appeal of the libellant in the above-entitled cause having come on to be heard, and having been argued by the advocates for the respective parties, and due deliberation being had, now on motion of Convers & Kirlin, proctors for the Red Cross Line, claimant, it is

Ordered, adjudged and decreed that the final decree of the district court herein be and the same hereby is affirmed, with costs of this court to the claimant. And on the like motion, it is further

Ordered, that a mandate issue from this court to said district court, to take further proceedings in accordance with this order, and the opinion of the court.

E. H. L.

N. S.

(Endorsed:) U. S. circuit court of appeals. Franklin Sugar Refining Co. against The Steamship *Silvia*. Order affirming decree. Filed Jun- 5, 1895. James C. Reed, clerk.

77 UNITED STATES OF AMERICA,
Southern District of New York, } ss.:

I, James C. Reed, clerk of the United States circuit court of appeals, for the second circuit, do hereby certify that the foregoing pages, numbered from 1 to 76½, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of The Franklin Sugar Refining Company *v.* The Steamship *Silvia*, as the same remain of record and on file in my office.

Seal United States Circuit Court of Appeals, Second Circuit.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed at the city of New York, in the southern district of New York, in the second circuit, this 31st day of

October, in the year of our Lord one thousand eight hundred and ninety-five and of the Independence of the said United States the one hundred and twentieth.

JAMES C. REED, *Clerk.*

78 UNITED STATES OF AMERICA, *ss:*

Seal of the Supreme Court of the United States.

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the second circuit, Greeting:

Being informed that there is now pending before you a suit in which The Franklin Sugar Refining Company is appellant and The Steamship Silvia, her engines, &c.—The Red Cross Line, claimant—is appellee, which suit was removed into the said circuit court of appeals by virtue of an appeal from the district court of the United States for the southern district of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme Court of the United
79 States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 19th day of November, in the year of our Lord one thousand eight hundred and ninety-five.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

80 [Endorsed:] Supreme Court of the United States. No. 790. October term, 1895. The Franklin Sugar Refining Co. *vs.* The Steamship "Silvia;" The Red Cross Line, cl'm't. Writ of certiorari.

81 United States Circuit Court of Appeals for the Second Circuit.

FRANKLIN SUGAR REFINING COMPANY, Libellant and Appellant,
against
THE STEAMSHIP "SILVIA," HER ENGINES, &C.; RED CROSS LINE, Claimant and Appellee.

It is hereby stipulated that the record heretofore certified to the Supreme Court by the clerk of this court on the application for a writ of *certiorari* herein stand as the record on the return of this court to said writ now granted under date of November 19th, 1895, and that this stipulation be certified to the Supreme Court by the clerk of this court as the return to the writ of *certiorari* aforesaid.

Dated N. Y., Nov. 22, '95.

CONVERS & KIRLIN, *Proctors for Silvia.*
WING, PUTNAM & BURLINGHAM,
Proctors for Lib'l & App'l't.

(Endorsed:) U. S. circuit court of appeals for the second circuit. Franklin Sugar Refining Company, lib't & app't, against The Steamship "Silvia," her engines, &c.; Red Cross Line, claimant & appellee. Stipulation. Wing, Putnam & Burlingham, proctors for lib'ts & app'l't, 45 William street, New York. Filed Nov. 23, 1895.

82 To the honorable the Supreme Court of the United States:

The record and all proceedings in the cause whereof mention is within made having been lately certified and filed in the office of the clerk of the honorable the Supreme Court of the United States, a certified copy of the stipulation of counsel is hereto annexed, and, under the direction of counsel for the appellant, said stipulation is certified as a return to this writ.

New York, Nov. 23, 1895.

[Seal United States Circuit Court of Appeals, Second Circuit.]

JAMES C. REED,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

83 [Endorsed:] Case No. 16,080. Supreme Court U. S., October term, 1896. Term No., 370. The Franklin Sugar Refining Company, app't, *vs.* The Steamship Silvia, &c. Writ of certiorari and return. Office Supreme Court U. S. Filed Mar. 5, 1896. James H. McKenney, clerk.

Endorsed on cover: Case No. 16,080. U. S. circuit court of appeals, second circuit. Term No., 370. The Franklin Sugar Refining Company, appellant, *vs.* The Steamship Silvia, her engines, &c.; The Red Cross Line, claimant. Filed November 4, 1895.

780 376 79

SUPREME COURT OF THE UNITED STATES

THE FRANKLIN SUGAR REFINING COMPANY
Libellant-Appellant

vs.

The Steamship SILVIA, her engines, etc.,
RED CROSS LINE
Claimant-Appellee

PETITION FOR WRIT OF CERTIORARI

WING, PUTNAM & BURLINGHAM
Proctors for Petitioner

UNITED STATES CIRCUIT COURT OF APPEALS 1

FOR THE SECOND CIRCUIT

THE FRANKLIN SUGAR REFINING COMPANY,
Libellant-Appellant,

AGAINST 2

The Steamship SILVIA, her engines, etc.,
RED CROSS LINE,
Claimant-Appellee.

Notice is hereby given that upon the petition of the libellant above named, verified the 31st day of October, 1895, and upon all the pleadings and proceedings herein, we shall, on Monday, the 11th day of November, 1895, at the opening of the Court on that day, or as soon thereafter as counsel can be heard, submit a motion, a copy of which is herewith served upon you, to the Supreme Court of the United States, at the Capitol, in the City of Washington. 3

New York, October 31st, 1895.

WING, PUTNAM & BURLINGHAM,
Proctors for Libellant. 4

To Messrs. CONVERS & KIRLIN,
Proctors for Claimant.

5 SUPREME COURT OF THE UNITED STATES.

THE FRANKLIN SUGAR REFINING COMPANY,
Libellant,
AGAINST
The Steamship SILVIA, her engines,
6 etc.,
RED CROSS LINE,
Claimant.

And now comes the Franklin Sugar Refining Company, by Harrington Putnam, its advocate, and moves this Honorable Court for a writ of *certiorari* directed to the Judges of the United States Circuit Court of Appeals for the Second Circuit, commanding them
7 to certify and return to this Court all the proceedings had in the suit in admiralty lately tried before them between the Franklin Sugar Refining Company, libellant, and the steamship *Silvia*, her engines, etc., whereof Red Cross Line is claimant.

HARRINGTON PUTNAM,
Advocate for Petitioner.

8 TO THE SUPREME COURT OF THE UNITED STATES:

The petition of the Franklin Sugar Refining Company for a writ of *certiorari* to the Judges of the United States Circuit Court of Appeals for the Second Circuit to bring before the Supreme Court of the United States a certain suit in admiralty, wherein it is libellant against the British steamship *Silvia*, whereof the Red Cross Line is claimant, respectfully shows:

FIRST.—On July 14th, 1894, the libellant filed its libel against the steamship *Silvia* in the District Court

of the United States for the Southern District of New York, to recover $4,805.66 for damage to a cargo of sugar shipped on said steamship at Matanzas, Cuba, on February 16th, 1894, and delivered to the libellant in Philadelphia.

SECOND.—The sugar was "damaged by sea water which had got into the ship by a glass port light broken during the voyage. The port was supplied with a proper iron cover or dummy, which was not closed or made fast at the time of sailing, although the hatches leading downward to that compartment were battened down."

Opinion of District Judge, p. 63.

The bill of lading under which the cargo was shipped contained no exception but "the dangers of the seas."

THIRD.—The District Judge held that the ship was guilty of negligence, for which she would have been held liable but for the provisions of the Act of Congress passed February 13, 1893, (27 Stat. at Large, c. 105, p. 445) which, by Section 3, provides:

"That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel."

The District Court found (1) that the ship was negligent in not closing the dummy, and (2) that she "sailed from Matanzas not in a seaworthy condition, from the fact that the hatches were battened down without the closing of the iron coverings of the ports;" but that (3) "in supplying the usual iron covers the owners 'had used due diligence to make the ship seaworthy,'" and were therefore relieved from liability under the act of February 13th, 1893; and (4) that the omission

13 to close the dummy was a fault or error in the management of the vessel within the terms of the act.

A decree was accordingly entered dismissing the libel, but, as the question was a new one, without costs.

FOURTH.—From this decree the libellant duly appealed to the United States Circuit Court of Appeals for the Second Circuit, which, on May 28th, 1895, affirmed the decree of the District Court, with costs.

No mandate has as yet been issued to said District
14 Court.

FIFTH.—The Circuit Court of Appeals said in its opinion, among other things:

"The learned District Judge who heard the cause in the Court below was of the opinion that the steamship was not in a seaworthy condition at the beginning of her voyage, but that her owners had used due diligence to make her so, and consequently that she was exonerated from liability for the injury to the cargo by the provisions of the Act of Congress of February
15 13, 1893, relating to navigation of vessels, commonly known as the Harter Act.

"We are of the opinion that the steamship was not unseaworthy when she began her voyage. Granting that the glass covers were not a sufficient protection for the ports in rough weather, it would have been but the work of a few moments to unbatten the hatch of the compartment and close them with the iron covers."

The Circuit Court of Appeals further held that the case was "controlled by the Act of Congress, and that
16 its provisions relieved the steamship from liability," saying, among other things:

"It is perfectly obvious from the language of this act that Congress intended to relax the severity of the obligation imposed on the ship owner as a carrier of goods by the pre-existing law as it had been declared by the courts."

It cited the cases of the *Edwin I. Morrison* (153 U. S., 199) and the *Caledonia* (157 U. S., 124), as to the

absolute nature of the warranty of seaworthiness, and 17
said:

"In the place of this responsibility the Act of Congress substitutes a less stringent one by declaring that if the owner shall exercise 'due diligence' to make the vessel in all respects seaworthy neither he nor the vessel is to be responsible for damages or loss in transporting merchandise resulting from 'faults or errors in her navigation or management;' nor for losses arising from dangers of the sea.

"Read as a whole the purpose of the act manifestly is, on the one hand, in the interests of the public to 18
prevent carriers from evading responsibility to exercise due diligence in providing seaworthy vessels and in the handling and care of the cargo, and, on the other hand, whenever they have exercised due diligence in these respects, to absolve them from liability for losses arising during the transit from the perils of the sea and from faults or errors in the navigation or management of vessels.

"It has been urged that section 3 is not intended to apply to foreign vessels, but the argument finds no support in the language of the section, and the intention to subject foreign vessels to a measure of respon- 19
sibility which is, as to domestic vessels, regarded by the act as too severe, ought not to be unnecessarily imputed to Congress."

Fifth.—Your petitioner avers that this case is one in which it is proper for this Court to issue a writ of *certiorari*, for the following reasons:

1. The question involved is of great importance and has never been passed upon by this Court. It is of great moment that shipowners and merchants should 20
know how far the obligations of carriers have been relaxed by the recent Act of Congress, if at all.

2. There is no controversy as to the facts. Both the District Court and the Circuit Court of Appeals found the steamship negligent. They differ as to the question of seaworthiness, but the facts on which their respective decisions are based are not in dispute. The District Court found that the "ship sailed from Matanzas not in a seaworthy condition from the fact

21 that the hatches were battened down without the closing of the iron coverings of the ports."

The Circuit Court of Appeals concludes that "it would have been but the work of a few moments to 'unbatten' the hatches and close the port with the iron cover." There is no evidence whatever to support this inference. The hatches were battened down for the express purpose of preventing access to the betweeen decks.

22 3. In a recent case in the English Court of Appeal (Dobell & Co. *v.* S. S. Rossmore Company, Limited, [1895] 2 Q. B. 408) where goods were damaged by sea water which came through a port hole closed by the ship's carpenter before the vessel started on her voyage, but in such an imperfect manner that it was not watertight, the ship relied on the act of Congress of February 13, 1893, which was incorporated in the bill of lading, as a defence. "The appliances for closing the port holes were sufficient and in good order, and the
23 competency of the ship's carpenter for the duties he had to perform was not disputed." The trial judge gave judgment for the plaintiffs, and in the Court of Appeal the defendant's appeal was dismissed, the Master of the Rolls and the Lord Justices Kay and A. L. Smith delivering the judgments.

Lord Esher said:

"It is obvious to my mind, from a consideration of the facts of this case, that the words of the 3d section which limit the owner's liability if he shall exercise
24 due diligence to make the ship in all respects seaworthy, must mean that this is to be done by the owner by himself or the agents whom he employs to see to the seaworthiness of the ship before she starts out of that port. Now, who was the agent at the port who was to look after the ship? If there was an agent there who employed the ship's carpenter he ought to have overlooked the carpenter and seen that the ship was seaworthy. If it was the carpenter who was the agent for this purpose, then it was his duty to see that the ship was seaworthy when she started. If she was not seaworthy when she started, it was the fault either of the agent employed to look

after the carpenter or of the carpenter himself. In either case, there was a person employed by the owner, or on behalf the owner, to see to the fulfillment of the condition that the owner had taken on himself by his contract, that the ship should be seaworthy when she started." 25

In view of this difference between the English Court of Appeal and our own intermediate courts as to the extent of the obligation of seaworthiness, it is important to obtain a decision from this Court on this question as speedily as possible. 26

4. This Court has at the present term granted a writ of *certiorari* in the case of Wupperman *v.* the *Carib Prince*, involving the second section of the act of February 13, 1893. The decision of this Court in that case, however, will leave still unsettled the interpretation of the third section of the act, which is raised by the present application.

In the case of the *Carib Prince* the bill of lading excepted injuries from latent defects. The libellants, in order to overcome this express exception, relied on the second section of the Harter bill, which provides that it shall not be lawful for any vessel transporting merchandise, etc., to insert in a bill of lading any covenant or agreement "whereby the obligations of the vessel owner to exercise due diligence, properly equip, man, provision and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage * * * shall in any wise be lessened, weakened or avoided." 27 28

In the present case it is the ship, not the merchant, which claims the benefit of the Harter bill, relying on the third section of the act, which provides that if the vessel owner shall exercise due diligence to make the said vessel in all respects seaworthy, the vessel shall not be held responsible for damage or loss resulting from faults or errors in navigation or in the management of the vessel.

5. The petitioner believes that this is the first case in which the 3rd section of the Harter Act has been construed by any Circuit Court of Appeals. Many actions are pending in this district and other districts, in which the defence rests upon the validity and interpretation of this third section.

Wherefore your petitioner prays that this Honorable Court will be pleased to grant a writ of *certiorari* in this cause to the United States Circuit Court of Appeals for the Second Circuit, to bring this cause before this Honorable Court, and for such other relief as to this Honorable Court may seem just.

THE FRANKLIN SUGAR REFINING COMPANY,
Petitioner.

By WING, PUTNAM & BURLINGHAM,
its proctors.

33

Southern District of New York, City and County of New York. } ss.:

Harrington Putnam, being duly sworn, says that he is a member of the firm of Wing, Putnam & Burlingham, proctors for the libellant, the Franklin Sugar Refining Company, and is authorized to make this verification on his own behalf, the libellant being a corporation of the Commonwealth of Pennsylvania, and absent from this district; that he has read the foregoing petition and knows the contents thereof, and that the same is true to the best of his knowledge. The sources of deponent's knowledge and the grounds of his belief are found in the proceedings and in the record of the cause in the District Court and in the United States Circuit Court of Appeals.

34

Harrington Putnam.

Sworn to before me this 31st day of October, 1895.

35

James Forrester,
[seal.] Notary Public, Kings County.
Certificate filed in N. Y. County.

I hereby certify that I have examined the foregoing petition, and that in my opinion the petition is well founded, and that the case is one in which the prayer of the petitioner should be granted.

36

James K. Hill.

Motion Papers.

Filed Oct. 19, 1896.

Supreme Court of the United States, 1

OCTOBER TERM, 1896.

FRANKLIN SUGAR REFINING COMPANY,
Libelant, Appellant,

vs.

The Steamship "SILVIA,"
Red Cross Line,
Claimant, Appellee.

No. 370.

2

NOTICE OF MOTION.

Sirs,—Please take notice that a motion will be made at the opening of court, on Monday, October 19, 1896, that the above entitled cause be advanced and set down for hearing at some day to be fixed by the Court.

Dated New York, October 9, 1896.

Yours, &c.,

CONVERS & KIRLIN,
Proctors for Claimant, Appellee. 3

To Messrs. COWEN, WING, PUTNAM & BURLINGHAM,
Proctors for Appellant.

4 SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1896.

FRANKLIN SUGAR REFINING COMPANY, Libelant, Appellant, vs. The Steamship "SILVIA," Red Cross Line, 5 Claimant, Appellee.	No. 370.

MOTION TO ADVANCE.

To the Supreme Court of the United States:

Comes now the appellee, and upon the annexed petition, moves this Honorable Court that the above entitled cause be advanced and set down for argument at some day to be fixed by the Court.

J. PARKER KIRLIN,
Of Counsel.

6 NEW YORK, Oct. 9, 1896.

SUPREME COURT OF THE UNITED STATES, 7

OCTOBER TERM, 1896.

FRANKLIN SUGAR REFINING COMPANY,
Libelant, Appellant,

v.

The Steamship "SILVIA,"
Red Cross Line,
Claimant, Appellee.

No. 370.

8

TO THE HONORABLE THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of the Red Cross Line, claimant and appellee, respectfully shows, as follows:

This cause was brought into this court upon a writ of *certiorari* issued to the Circuit Court of Appeals, for the Second Circuit, upon the application of the appellant, at the last term of Court. The question involved was as to whether the claimant of the steamship *Silvia* was absolved from responsibility for damage to a cargo of sugar while on a voyage from Cuba to Philadelphia, by reason of the 9
provisions of the act of Congress, approved February 13, 1893, "Relating to the navigation of vessels, bills of lading and to certain obligations, duties, and rights in connection with the carriage of property," and commonly called the "Harter Act." The question is one of great interest and importance and has never been passed upon by this Court. It is of great moment that shipowners and merchants should know how far, if at all, the obligations, duties and liabilities of carriers have been altered or relaxed by the recent act of Congress. Many actions are pending in United States courts in

10 which the defense rests upon the validity and interpretation of the act, and the decisions already rendered under the statute in the lower courts have not been entirely harmonious, either as to the extent of its operation or to the purpose of the legislation.

The petitioner believes that this was the first case in which the third section of the act was construed by any Circuit Court of Appeals (68 Fed. Rep., 230), and the first in which it was sustained as an exemption from responsibility for damage to cargo upon a foreign vessel at sea.

In view of the writ of *certiorari* having been granted, persons engaged in mercantile pursuits naturally await the decision of this Court before
11 finally accepting the construction of the act adopted in the court below.

The question involved is one of gravity and importance, and in the belief of the petitioner is one which ought to be decided by this Court as promptly as the business of the Court will reasonably permit.

RED CROSS LINE,
Petitioner.
By CONVERS & KIRLIN,
Its Proctors.

NEW YORK, October 9, 1896.

I hereby certify that I have examined the fore-
12 going petition, and that, in my opinion, the case is one in which the prayer of the petitioner should be granted.

J. PARKER KIRLIN,
Of Counsel.

No. 370. 79

Motion Papers.

Filed Oct. 19, 1896.

Supreme Court of the United States,

OCTOBER TERM, 1896.

FRANKLIN SUGAR REFINING COMPANY, Libelant, Appellant, vs. The Steamship "SILVIA," Red Cross Line, Claimant, Appellee.	No. 370.

MEMORANDUM FOR APPELLANT ON MOTION TO ADVANCE.

The appellant acknowledges service of the notice of motion to advance, dated October 9, 1896, and concurs in the application.

HARRINGTON PUTNAM,
CHARLES C. BURLINGHAM,
Proctors for Appellant.

NEW YORK, October 12th, 1896.

No. 790. 34a 19.

Brief of Putnam for Appt

Filed Nov. 11, 1895.

SUPREME COURT OF THE UNITED STATES

No. 790

OCTOBER TERM, 1895

THE FRANKLIN SUGAR REFINING COMPANY
Libellant-Appellant

vs.

The Steamship SILVIA, her engines, etc.,
RED CROSS LINE
Claimant-Appellee

BRIEF FOR LIBELLANT IN SUPPORT OF PETITION FOR CERTIORARI

HARRINGTON PUTNAM
Advocate

SUPREME COURT OF THE UNITED STATES

THE FRANKLIN SUGAR REFINING COMPANY, Libellant-Appellant, AGAINST The Steamship SILVIA, her engines, etc., RED CROSS LINE, Claimant-Appellee.	On Petition for certiorari to bring up record.

BRIEF FOR LIBELLANT IN SUPPORT OF PETITION

This suit was brought against the British steamship *Silvia* in the District Court of the United States for the Southern District of New York, to recover $4,805.66 for damage to a cargo of sugar shipped at Matanzas, Cuba, and delivered in Philadelphia in February, 1894.

The bill of lading acknowledges the shipment in "good order and well conditioned," and contains no exception but the "dangers of the seas."

"The cargo was injured by sea water which came through a port in one of the compartments of the between-decks which had been recently fitted up to carry steerage passengers, but which at the time was only used for the storage of ropes and extra gearing. The port was one of several in the compartment, was of the diameter of eight inches, was furnished with a heavy glass cover set in a brass frame, and also with an extra cover of iron, and was eight or nine feet above the water when the vessel was deep laden."

Opinion of Circuit Court of Appeals, Record, p. 71.

The steamship sailed from Matanzas in the early morning of February 16th. In the afternoon of the same day the engineer reported water in the engine room, which, after a search, was found to be coming through one of the ports in the between-decks, the glass cover of which had been broken, by what cause does not appear. The master says, "no sea could have broken it, as it was too high up." (Record, fol. 78.) The suggestion that it may have been broken by wreckage, is a mere conjecture. No wreckage came through the port; none was found in the steerage; none was reported to the officers; and none was seen by any one on the steamer. (Record, fols. 86–7 and 159–60.)

The District Judge found (1) that the ship was negligent in not closing the dummy, and (2) that she "sailed from Matanzas not in a seaworthy condition, from the fact that the hatches were battened down without the closing of the iron coverings of the ports"; but that (3) "in supplying the usual iron covers the owners 'had used due diligence to make the ship seaworthy,'" and were therefore relieved from liability under the act of February 13th, 1893; and (4) that the omission to close the dummy was a fault or error in the management of the vessel within the terms of the act.

Opinion of District Court, Record, pp. 63–5.

The Circuit Court of Appeals affirmed the decision of the District Court, holding that the case was controlled by the Act of February 13, 1893, and that "its provisions relieved the steamship from liability."

Opinion of Circuit Court of Appeals, Record, pp. 71–6.

It is respectfully submitted that the lower Courts erred in sustaining this defence.

POINTS.

I.—The negligence of the ship was abundantly established.

The case is a much stronger one than the *Majestic*, now in this Court by *certiorari*, in which both the District Court and the Circuit Court of Appeals held the ship guilty of negligence for damage done through a broken port.

56 Fed. R., 244; on appeal, 60 Fed. R., 624.

II.—The steamship sailed from Matanzas in an unseaworthy condition.

This the learned District Judge expressly found: "Although the ship sailed from Matanzas not in a seaworthy condition from the fact that the hatches were battened down without the closing of the iron coverings of the ports," etc.

Opinion, fol. 255.

The two facts of open dummies, and the hatch battened down so that no one could inspect the condition of the between-decks from time to time, and shut the dummies if necessary, rendered the ship unseaworthy.

The Circuit Court of Appeals did not agree with the District Judge in this, for the reason that it thought "it would have been but the work of a few moments to unbatten the hatch of the compartment," and close the ports with the iron covers. (Record, fol. 287). This conclusion is not sustained by the evidence.

No. 1 between decks had no cargo; it contained only a few ropes and stores (fol. 110). It had been fitted up for a steerage just before the steamer left London for Matanzas, and an additional port had been put in on each side forward of the two which had been in her since she was constructed (Shotell, fols. 183–4).

The hatch of this No. 1 between-decks or steerage was battened down on leaving Matanzas, and there was no access to the steerage other than the hatch (fols. 111–2).

The hatch was battened down for the purpose of preventing access to the between-decks, there being nothing there which was wanted in the ordinary course of the voyage from Matanzas to Philadelphia.

Clark, master, fols. 105, 106.
Nicholson, fols. 126, 148.

In the case of Steele *v.* State Line S. S. Co. (L. R., 3 App. Cas., 72), cited in the opinion of the Circuit Court of Appeals, Lord Blackburn put a case entirely analagous to the present as follows:

"If, for example, this port was left unfastened, so that when any ordinary weather came on, and the sea washed as high as the port, it would be sure to give way and the water come in, unless something more was done; if in the inside the wheat had been piled up so high against it and covered it, so that no one would ever see whether it had been so left or not, and so that if it had been found out or thought of, it would have required a great deal of time and trouble (time above all) to remove the cargo to get at it and fasten it—if that was found to be the case, and it was found that at the time of sailing it was in that state, I can hardly imagine any jury finding anything else than that a ship which sailed in that state did not sail in a fit state to encounter such perils of the sea as are reasonably to be expected in crossing the Atlantic" (p. 90).

The learned District Judge, whose experience in admiralty cases is very great, knew what it meant to batten down a hatch. The very purpose of doing this is to prevent easy access to the hold, and it needs no testimony to show that if rough weather came on it would be a very dangerous thing to attempt to open the hatch.

If the No. 1 between-decks of the *Silvia* had been in use as a steerage, as it was subsequently, and if, as the captain puts it, a steward was "going up and down there all the time," there would be no reason

why the dummies should not be open; but to batten down the hatch and leave the dummies open was to make the vessel unseaworthy, that is, unfit to encounter the perils of the voyage.

If the attendance of persons to watch for changes of weather was necessary as a condition of using the ports, provision by the owners for such attendance was essential to make the vessel seaworthy. The owners had no right to cut a dangerous opening in the ship's side, and then say that because they had placed near it an appliance which could be used to make it safe, but which required the attendance of some one especially charged with the duty of using it, they had fulfilled their obligations, unless they have in fact assigned such a person to that special duty. Many steamers have cargo ports in their sides, and lumber vessels have ports in the bows, which are kept closed by bolts and fastenings which require caulking or rubber packing to make them watertight. Would such a vessel be seaworthy if her owner had provided a bale of oakum and tools to use it, if they had not in fact been used?

Apart from this circumstantial unseaworthiness, if it may be so called, the *Silvia* was unseaworthy in the ordinary sense of the word. The glass port itself was manifestly insufficient even in fine weather. It gave way without any stress of weather or extraordinary cause. The port should have been of sufficient strength in its original construction to withstand the pressure of ordinary seas. Nothing extraordinary occurred. Yet it gave way. This is unseaworthiness.

III.—The question presented on this application is whether a vessel leaving port in an unseaworthy condition, is relieved by the act of Congress of February 13, 1893, from liability for damage to cargo, resulting from such unseaworthiness.

The third section of the act provides

"That if the owner of any vessel transporting mer-

chandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel."

27 Stat. at L., c. 105, p. 445.

1. The Circuit Court of Appeals held that the case was "controlled by the act of Congress, and that its provisions relieved the steamship from liability."

"It is perfectly obvious from the language of this act that Congress intended to relax the severity of the obligation imposed on the ship owner as a carrier of goods by the pre-existing law as it had been declared by the courts."

Opinion, fol. 293.

It cited the cases of the *Edwin I. Morrison* (153 U. S., 199) and the *Caledonia* (157 U. S., 124), as to the absolute nature of the warranty of seaworthiness, and said:

"In the place of this responsibility the Act of Congress substitutes a less stringent one by declaring that if the owner shall exercise 'due diligence' to make the vessel in all respects seaworthy neither he nor the vessel is to be responsible for damages or loss in transporting merchandise resulting from 'faults or errors in her navigation or management;' nor for losses arising from dangers of the sea."

Opinion, fol. 297.

2. In the recent case of Dobell & Co. *v.* S.S. Rossmore Company, Limited, [1895] 2 Q. B., 408, goods were damaged by sea water which came through a port hole closed by the ship's carpenter before the vessel started on her voyage, but in such an imperfect manner that it was not water-tight. The ship relied on the act of Congress of February 13, 1893, which was incorporated in the bill of lading, as a defence. "The appliances for closing the port holes were sufficient and in good

order, and the competency of the ship's carpenter for the duties he had to perform was not disputed." The trial judge gave judgment for the plaintiffs, and in the Court of Appeal the defendant's appeal was dismissed, the Master of the Rolls and the Lords Justices Kay and A. L. Smith delivering the judgments.

Lord Esher said:

"It is obvious to my mind, from a consideration of the facts of this case, that the words of the 3d section which limit the owner's liability if he shall exercise due diligence to make the ship in all respects seaworthy, must mean that this is to be done by the owner by himself or the agents whom he employs to see to the seaworthiness of the ship before she starts out of that port. Now, who was the agent at the port who was to look after the ship? If there was an agent there who employed the ship's carpenter he ought to have overlooked the carpenter and seen that the ship was seaworthy. If it was the carpenter who was the agent for this purpose, then it was his duty to see that the ship was seaworthy when she started. If she was not seaworthy when she started, it was the fault either of the agent employed to look after the carpenter or of the carpenter himself. In either case, there was a person employed by the owner, or on behalf the owner, to see to the fulfillment of the condition that the owner had taken on himself by his contract, that the ship should be seaworthy when she started."

Thus on facts substantially similar, the Circuit Court of Appeals for the Second Circuit has exonerated the *Silvia* from liability, and the English Court of Appeal has held the *Rossmore* liable.

In view of this difference between the English Court of Appeal and our own intermediate courts as to the extent of the obligation of seaworthiness, it is important to obtain a decision from this Court on this question as speedily as possible.

3. This Court has at the present term granted a writ of *certiorari* in the case of Wupperman *v.* the *Carib Prince*, involving the second section of the act of February 13, 1893. The decision of this Court in that

case, however, will leave still unsettled the interpretation of the third section of the act, which is raised by the present application.

In the case of the *Carib Prince* the bill of lading excepted injuries from latent defects. The libellants, in order to overcome this express exception, relied on the second section of the Harter bill, which provides that it shall not be lawful for any vessel transporting merchandise, etc., to insert in a bill of lading any covenant or agreement "whereby the obligations of the vessel owner to exercise due diligence, properly equip, man, provision and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage * * * shall in any wise be lessened, weakened or avoided."

In the present case it is the ship, not the merchant, which claims the benefit of the Harter bill, relying on the third section of the act, which provides that if the vessel owner shall exercise due diligence to make the said vessel in all respects seaworthy, the vessel shall not be held responsible for damage or loss resulting from faults or errors in navigation or in the management of the vessel.

4. Many actions are pending in this district and other districts in which the defence rests upon the validity and interpretation of the third section of the act. Large interests depend on the determination of the question.

The question is of so great consequence to shipowners and merchants that it should be passed upon by the Supreme Court.

IV.—A writ of *certiorari* should be granted herein.

November, 1895.

WING, PUTNAM & BURLINGHAM,
Proctors for Petitioner.

HARRINGTON PUTNAM,
Advocate.

No. 790. 270 59

Brief of Kirlin for Appellee (

Filed Nov. 11, 1895.

Supreme Court of the United States,

NO. 790. OCTOBER TERM, 1895.

THE FRANKLIN SUGAR REFINING COMPANY,
Libelant, Appellant,

vs.

THE STEAMSHIP "SILVIA," RED CROSS LINE,
Claimant, Appellee.

BRIEF FOR "SILVIA" IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

CONVERSE & KIRLIN,
Proctors for "Silvia."

J. PARKER KIRLIN,
Advocate.

In the

Supreme Court of the United States.

OCTOBER TERM, 1895.

The Franklin Sugar Refining Company,
Libelant, Appellant,

vs.

The Steamship "Silvia,"
Red Cross Line,
Claimant, Appellee.

BRIEF FOR "SILVIA" IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement.

The *Silvia* is an iron steamship, classed 100 A1 at Lloyds, and a first-class vessel in every respect (Record, fol. 34). She was maintained in first-class navigable condition, and was not wanting in seaworthiness in any known regard (fol. 65). She was officered by a master of 16 years' experience (fol. 34), and a chief officer who also apparently holds a master's certificate, since he had pre-

viously been in command of the same vessel (fol. 152). On a voyage from Cuba to New York, libelant's cargo was damaged by water entering the forward 'tween-decks, which was fitted up as a steerage (but in which no passengers were carried on the voyage in question), the water passing thence down into the lower hold, where the damage occurred. The glass port which broke during the voyage was one of a series set in the side of the ship, to afford light to the steerage. As the vessel was laden, this port was 11 feet above the water line (fol. 101). It consisted of a round glass plate five-eighths of an inch thick, and about 8 inches across, set in a brass frame, which, in turn, fitted tightly into a hole made in the plating of the ship, and was opened and shut on a hinge fastened to the side of the port (fols. 44-46). The port had been properly and securely fastened before the vessel sailed, and was sound and in good condition (fol. 125). An iron blind, working upon a hinge at the top, was provided to close over the glass port, as and when required. This blind, as well as the others, provided for the other ports in the steerage, was left open on the voyage in question, the glass being thought, from previous experience, sufficient to withstand the mere action of sea water against the side of the ship eleven feet above the water line. If the iron blind had been closed, as it might have been, it would have prevented the entrance of any water when the glass port became broken (fols. 45, 46, 51, 53, 54, 79, 80).

The vessel had been employed in trading between New York and Halifax, and irregularly to Cuba, for some years, with a series of similar ports extending from the stem to the stern of the ship, none of which, in the most severe weather, had ever before been broken. This was one of two additional ports made in London three months before this voyage, and in the interim it had made several voyages in safety (fol. 104).

According to the claimant's evidence, it is not the practice, either in this ship or in others, to close the iron blind over a 'tween-deck port as far above the water line as this, except when cargo is on the inside and there is danger of the glass being broken by a blow from within, the construction of the ports being such that they are assumed and found to be of sufficient strength to resist the ordinary action of the sea (fols. 46–50, 118–121, 130, 181–182).

A further reason for leaving the dummy open in the steerage on this voyage was that some of the stores, oil, spare gear, &c., were in there (fol. 76), and were liable to be wanted at any time on the voyage. Counsel for libelant asked the master whether there was any special reason for leaving the dummy open on this occasion, and he said that there was.

"Q. No particular reason for leaving it open, was there? A. Yes. We wanted to go down there at any time for stores, oil, lights and so on" (fol. 79).

Access to the steerage was through the No. 1 hatch. After the glass ports had been closed at Matanzas, the covers of this No. 1 hatch had been put on and battened down. Battening down a hatch, as the Court is aware, consists merely in spreading canvas tarpaulins on top of the hatch covers, (of which there are generally a large number divided up into small sections, used for closing the hatchways,) and wedging the edges of the canvas up against the sides of the iron hatch coaming, so as to make the hatch watertight. It is perfectly obvious that it could, at most, take only a few moments to knock out the wedges at one end, lift the tarpaulins, and take off one of the sectional hatch covers, which would be probably 2½ by 4 feet, and thus obtain access to the steerage. The Circuit Court of Appeals so found (fol. 287). It is observed that libelant's petition, with the view of presenting a plausible case for the intervention of this Court,

states (fol. 21): "*There is no evidence whatever to support this inference.* The hatches were battened down for the express purpose of preventing access to the 'tween-decks."

Attention is called to the absence of any citation from the record in support of the latter sentence. The Court will search the record in vain for anything to support it. Hatches are battened down, as the Court knows, to keep out water, not to keep out men. That there was easy and ready access to this steerage was distinctly proved by the libelant's counsel himself on the cross-examination of the master:

"Q. What was it (the steerage) used for on this occasion? A. We had some lights, a little stores, and one thing and another there.

Q. *Do you mean that there was perfectly easy access to that steerage at all times during this voyage?* A. *Yes.*

Q. *Nothing to prevent a man from seeing whether anything had happened to these ports by going down there into the steerage?* A. *Nothing in the world* to hinder him from seeing all around" (fols. 76–77).

When water was discovered entering the ship, the frame in which the glass was set was found closed and fastened; some shattered remains of the glass were still in the frame and the remainder of it lay broken in many pieces in the steerage (fols. 189, 190, 179, 180). It was the opinion of the witnesses examined in the case that the mere pressure of water could not have broken the glass, but that it must have been broken by a piece of wood afloat on the surface of the waves during the period of a storm (fols. 55, 56, 85, 129). The inference that it was so broken arises from two circumstances: (1.) The many pieces into which the glass was broken; (2.) Its great strength, arising from the fact that it was only 8 inches across and 5/8 of an inch thick, which, from its height above the water line, would make it impossible that the crest of a wave alone could break it; and, furthermore, because, in common experi-

ence, these glasses so set are found sufficient to resist both ordinary and extraordinary action of mere sea water.

There was no evidence in the case to contradict that furnished by the steamship, that the common usage, based upon experience in similar cases, was to depend entirely on the glass to prevent incursion of sea water, except where there was cargo in a compartment which would be liable to damage the port from within, and which would prevent access to the port for the purpose of closing the blind, in case any accident should occur to the glass.

POINTS.

I.

The vessel was not unseaworthy when she started on the voyage.

The above recital of facts shows that the steamer was seaworthy in all respects, and the Circuit Court of Appeals so found. The District Judge found that the vessel was not seaworthy because the blind was not closed; nevertheless, his decision was the same as that of the Circuit Court of Appeals, because he found that the omission to close it was the failure of those in charge of the vessel to use the appliances which the owners furnished, and that the closing of the blind would have prevented the loss. He further found, whether, in fact, the vessel was seaworthy or not, the owner had used due diligence to make her so within the Third Section of the Act of Congress, approved February 13, 1893 (27 Statutes at Large, 445), and that the loss resulted from a "fault or error in the management" of the ship within that section, citing in

support of his decision the case of Hedley *vs.* Pinckney Steamship Company, 1894, Ap. Cases, 222, which was precisely in point, and supported the proposition for which it was cited. The Circuit Court of Appeals, however, considered that the District Judge had laid down too strict a rule of seaworthiness, and that, as the vessel was obviously fit for the ordinary weather to be encountered on the voyage without the iron blind shut, and as there was ready access to the hold to shut it, if necessary, upon the approach of extraordinary storms, the loss should be ascribed to the negligence of those in charge of the vessel in her "management and navigation" during the voyage, and not before the voyage began.

Authority for that proposition is found in the judgments of Lord Cairns and Lord Blackburn in Steele *vs.* State Line, 3 Ap. Cases, 72, 82, and in Hedley *vs.* Pinckney Steamship Co. (*supra*). The case of *Dobell* vs. *S. S. Rossmore Co.*, 1895, 2 Q. B., 408, is not in conflict with the decision of the Circuit Court of Appeals. This case was cited to the Court there in the argument of counsel (p. 411), and it will be found on examination of the opinions that the case there turned upon the finding of fact, that the port which had been left insecurely fastened was blocked up with cargo, so that there was not ready access to the hold to secure it upon the approach of storm. Lord Esher (p. 414) said:

"Now comes the question, was the ship seaworthy when she started? There was a porthole through which water could come. If that had been all, and there had been the means of immediately closing the porthole, the matter would have been otherwise, but here there were no facilities for closing the porthole, for it could only be closed after the removal of a considerable part of the cargo; so, that if there were rough weather or a storm, the water would be coming in all the time until the porthole could be got at and closed."

The other Judges point out the difference between that case and the case of *Steele* vs. *State Line*, 3 App. Cases, 72, and distinguish them on the ground that there was not ready access to the porthole in the Dobell case; while in Steele *vs.* State Line, it was decided that the vessel would be seaworthy if there was ready access in such case. Possibly the Dobell case would have been in conflict with the decision of the District Court in this case, although it is pointed out that the Court of Appeals in the Dobell case was dealing with this act simply as a clause in a bill of lading, whereas the District Judge in this case was dealing with it as a statute, in which the word "voyage" does not occur. It is, however, unnecessary in this case to consider whether the decision of the District Judge or of the Court of Appeals in Dobell *vs.* S. S. Rossmore Co. be correct, as the Court of Appeals, on undisputed facts, found that the ship was seaworthy, and no decision of this Court in any similar case or upon similar facts held the contrary, nor is there any reason to suppose that it would render a different decision in this case.

II.

The fact that this Court has issued a writ of *certiorari* in the case of Wuppermann *v.* The *Carib Prince* is immaterial.

The case of the *Carib Prince* bears no relation to the present one, and any consideration of the Harter Act was in fact unnecessary for the decision in that case. The steam-ship there defended upon the exception in the bill of lading from latent defects, libelants' evi-

dence having disclosed that the damage arose from such cause. The counsel for the libelants in the Circuit Court of Appeals raised an argument that the insertion of any clause in the bill of lading, qualifying or assuming to qualify the implied warranty of seaworthiness, was contrary to the second clause of this statute. The Circuit Court of Appeals, therefore, considered that matter and resolved it in the negative, but as the contract thereunder consideration was made in British territory, upon a British ship, for transportation of goods from a British port to a port in the United States, and the loss occurred at sea, without the negligence of the shipowner, it is obvious that the question whether the insertion of an exception against latent defects was valid or invalid, would be determinable by Engligh law, and not by the law of this country, and, furthermore, that the first and second sections of this statute, and the fourth section, which provides a penalty, were only designed to apply to American vessels or to foreign vessels loading in American ports, and not to vessels loading abroad, trading to these ports. It will be observed that the first and second sections deal only with vessels trading between port or ports in the United States and foreign ports (meaning between ports in the United States or between a United States port and a foreign port), whereas, the language of the third section makes that applicable to vessels trading *to or from* any port or ports in the United States of America.

III.

No sufficient reason being shown for the intervention of this Court, and the questions to which the attention of the Court is asked being in the main academic, inviting rather a discussion of the Harter Act by the Court than a reversal of this judgment, the writ of *certiorari* prayed for should be refused.

Respectfully submitted.

CONVERS & KIRLIN,
Proctors for *Silvia*.

J. PARKER KIRLIN,
Advocate.

NEW YORK, November 8, 1895.

No. 79 S.

Brief of Putnam & Burlingham for Appellant.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1897

Filed Mar. 2, 1898.

No. 79

THE FRANKLIN SUGAR REFINING COMPANY

Appellant

vs.

The Steamship SILVIA, RED CROSS LINE

Appellee

BRIEF FOR THE APPELLANT

HARRINGTON PUTNAM
CHARLES C. BURLINGHAM
Advocates

COWEN, WING, PUTNAM & BURLINGHAM
Proctors

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SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1897.

THE FRANKLIN SUGAR REFINING COMPANY, Appellant,
vs.
The steamship SILVIA, RED CROSS LINE, Appellee.
No. 79.

On *certiorari* to the Circuit Court of Appeals for the Second Circuit.

BRIEF FOR APPELLANT.

This suit was brought in the District Court for the Southern District of New York to recover $4,805.66 for damage to a cargo of sugar shipped at Matanzas, Cuba, and delivered in Philadelphia in February, 1894.

The District Judge, the Honorable Addison Brown, dismissed the libel without costs.

Opinion of District Judge, Record, pp. 49, 50.
Decree of District Court, pp. 50–1.

The steamship *Silvia* is a British vessel of 1104 tons net register, built in Newcastle in 1884. She sailed from Matanzas on February 16th, 1894, with a full cargo of sugar, consisting of 13,227 bags, shipped by Hidalgo & Co. of Havana. The bill of lading (Claimant's Exhibit B, p. 46) acknowledges the shipment "in good order and well conditioned," and contains no exception but "the dangers of the seas."

The steamship sailed from Matanzas in the early morning of the 16th. In the afternoon of the same day the engineer reported water coming through into the engine room (p. 9), and, after a search, it was found that the water had come through a port hole or side port on the starboard side of the forward or No. 1 between decks, had run aft through the wooden bulkhead which divides No. 1 from No. 2 between decks (p. 17), and rising above the coamings of the hatch, which are 12 or 15 inches high (p. 17), had gone into No. 2 hold.

No. 1 between decks had no cargo; it contained only a few ropes and stores (p. 21). It had been fitted up for a steerage just before the steamer left London for Matanzas, and an additional port had been put in on each side forward of the two which had been in her since she was constructed (Shotell, p. 37). The hatch of this No. 1 between decks or steerage was battened down on leaving Matanzas, and there was no access to the steerage except by the hatch (p. 21).

It was through one of the newly-constructed ports that the water came in—the forward one on the starboard side. When the officers opened the forward hatch and went in to the steerage they found that the inside shutter or dummy to this port was open and the glass had been broken. "The dummy is an iron casting, which shuts with a hinge on the inside of the glass and protects it from the inside" (p. 7). When it was shut it kept the water out completely, "with the exception of just a slight weep—not to do any damage of any kind" (p. 9; also p. 15).

The District Judge found (1) that the ship was negligent in not closing the dummy, and (2) that she "sailed from Matanzas not in a seaworthy condition, from the fact that the hatches were battened down without the closing of the iron coverings of the ports;" but that (3) "in supplying the usual iron covers the owners 'had used due diligence to make the ship seaworthy,'" and were therefore relieved from liability under the act of February 13th, 1893 and (4) that the omission to close the dummy was a fault or error in the management of the vessel within the terms of the act.

Opinion of District Judge, pp. 49 & 50.

From the decree of the District Court entered December 1st, 1894, the libellant appealed, and on May 28th, 1895, the Circuit Court of Appeals rendered its decision, holding that the case was controlled by the Harter Act, and that "its provisions relieved the steamship from liability," and affirming the decree of the District Court, with costs.

Opinion of U. S. Circuit Court of Appeals, Record, pp. 52–6.

Application was thereupon made by the libellant to this Court for a writ of *certiorari*, which was granted on November 19th, 1895 (Record, p. 57).

POINTS.

I.—THE NEGLIGENCE OF THE SHIP WAS ABUNDANTLY ESTABLISHED.

It would not be necessary to discuss the question of negligence, but for the doubt contained in the opinion of Judge Wallace, who said:

"Whether they" (those in charge of the navigation of the steamship) "were justified in supposing that there could be any reasonable apprehension of risk from a port so small and so high above the water line as this, protected as it was by a glass cover of such thickness, is a question of fact in respect to which different minds might differ. Assuming, however, that they were not and they were negligent in not putting on the iron cover, we think the case is controlled by the act of Congress," etc., etc.

Opinion of Circuit Court of Appeals, p. 54.

The learned District Judge had no doubt as to the negligence. He said, speaking of the port which was broken:

"The port was supplied with a proper iron cover or dummy, which, however, was not closed or made fast at the time of sailing, although the hatches leading downward into that compartment were battened down. This, in my judgment, was negligence on the part of the ship."

Opinion of District Judge, p. 49.

1. The glass was not broken by a sea. This was the captain's first explanation (Clark, p. 18; Barrett, pp. 41–2), and this is the claim made in the protest (p. 47). In his deposition, however, the master admitted that this was not the fact (pp. 9 and 18).

The weather was fine. The captain says they had "the tail end of a strong breeze, a norther" (p. 9), "a moderate gale," "a moderate wind;" but the ship did not slow down for it (p. 15).

See also Nicholson, 1st officer (p. 29).

The log is not produced (see p. 10).

The broken port was 30 feet or more from the stem, and 8 or 9 feet above the water line (p. 14).

"Q. That is the reason why you say that no sea could have broken it? A. Yes.

"Q. Too high up? A. Too high up."

Clark, master, p. 14.

2. The captain's second theory was that the glass was broken by wreckage. Yet he saw none.

"Q. Do you think that some wreckage broke this glass? A. I only say that because I don't think it could have been broken by the sea.

"Q. That is a mere conjecture? A. Yes.

"Q. No wreckage came through the port? A. No.

"Q. Nothing was found in the steerage? A. No.

"Q. Did any of the officers or crew report having seen any wreckage to you? A. Not that I remember.

"Q. Did you have any entry made in the log about wreckage? A. Not that I know of.

"Q. Well, of course, if you had seen any wreckage, you would have slowed down for it. You wouldn't have gone through it at full speed? A. No; certainly not.

"Q. Was it a clear day? A. Perfectly clear."

Clark, p. 16.

See also Nicholson, 1st officer, p. 32.

The case is much stronger than the *Majestic* (166 U. S., 37; reported below 56 Fed. R., 244, and 60 Fed. R., 624), where the ship actually passed through some wreckage.

3. The damage was due to the failure to shut the dummies or iron shutters in the No. 1 between decks when the vessel sailed.

They could have been shut.

"Q. Was there anything the matter with the dummy on the inside of that port light? A. Not that I am aware of.

"Q. Could it have been shut when you left Matanzas just as well as after you discovered it? A. Yes."

Clark, master, p. 14.

If it had been shut there would have been no damage—"only a mere weep * * * there is enough scuppers to carry off a little water of that kind" (Clark, p. 15).

The captain claims that he was very particular to see that the glass ports themselves were carefully closed (Clark, p. 12). He gave orders to the chief officer to have them closed.

"Q. Did you give him any orders about shutting the dummies? A. No; can't say I did distinctly about the dummies."

Clark, p. 13.

His alleged reason for leaving the dummies open was that they "wanted to go down there at any time for stores, oil, lights, and so on" (Clark, p. 14). But the hatch of No. 1 between decks was battened down before they left Matanzas (p. 20), and the chief officer says that there was nothing in the No. 1 between decks that they wanted in the ordinary course of the voyage from Matanzas to Philadelphia (Nicholson, p. 29).

It appears, therefore, that there was no reason for not shutting the dummies.

"Q. Did you know it (the hatch) was battened down when you left Matanzas? A. Certainly I did.

"Q. Did you know at that time the port dummies were not shut in that steerage? A. I couldn't say.

"Q. Do you mean to say that you allowed that hatch to be battened down without seeing that those dummies were closed there? A. Yes."

Clark, p. 21.

"Q. The idea of a port being stove in never entered your head until this case? A. No.

"Q. If it had, I suppose you would have seen that those dummies were closed? A. I should certainly have ordered them to be closed, and have it understood that they were closed.

"Q. You don't go to sea now with hatches battened down and dummies opened in that steerage? A. Because we don't have the steerage closed up there. We have a steward up and down there all the time. We have our ice-house down there.

"Q. To see how things are going on down there? A. Yes."

Clark, p. 22.

4. The negligence of the officers in not closing the dummies was aggravated by the battening down of the hatch, which prevented access to the between decks.

Clark, p. 20.
Nicholson, p. 24.

II.—THE STEAMSHIP SAILED FROM MATANZAS IN AN UNSEAWORTHY CONDITION.

She was unseaworthy in two respects :

(1.) She had an insufficient glass port.

(2.) She went to sea with dummies not closed and hatch battened down so as to prevent access to the between decks.

1. The port was not a "proper port." No better evidence was needed than that it gave way on an ordinary voyage, in ordinary weather, without any strain or stress to cause it.

This is presumptive evidence of unseaworthiness. The port should have been of sufficient strength to withstand the pressure of ordinary seas. There was no stress of weather. Nothing extraordinary occurred. There is no evidence of wreckage. There was nothing inside the between decks that could have broken the glass. In fine weather the glass port was manifestly insufficient.

It is significant that the sidelight stove in was one of two ports cut in London just previous to sailing. The captain did not join the vessel until she arrived out in St. Johns (p. 20). But the carpenter, who had made the voyage from London, says that about a week or two before the steamer sailed the owner fitted up the steerage and cut two new ports, one on each side of No. 1 between decks.

Shotell, carpenter, p. 37.

There is no proof whatever as to how these ports were cut by the iron-masters in the London dry dock ; whether they were done carefully or not ; whether under supervision or not. Nor is there any proof that the owners took any pains to see that they were well done.

2. The *Silvia* was unseaworthy owing to the fact that she sailed from Matanzas with hatches battened down and dummies open.

This is unseaworthiness, or—to use the words of Lord Cairns in Steel *v.* The State Line S. S. Co.—unfitness "to perform the service which she had undertaken with reference to the goods."

The learned District Judge expressly found that the ship was unseaworthy:

"Although the ship sailed from Matanzas not in a seaworthy condition from the fact that the hatches were battened down without the closing of the iron coverings of the ports," etc.

Opinion, p. 49.

The two facts of open dummies and the hatch battened down so that no one could inspect the condition of the between-decks from time to time, and shut the dummies, if necessary, rendered the ship unseaworthy.

The Circuit Court of Appeals did not agree with the District Judge in this, for the reason that it thought "it would have been but the work of a few moments to unbatten the hatch of the compartment," and close the ports with the iron covers. (Record, p. 53).

We submit that the learned District Judge was right and the Circuit Court of Appeals wrong. The trial Judge, whose experience in admiralty cases is exceptional, appreciated, as the Appellate Judges did not, the meaning of battening down the hatches.

No. 1 between decks had no cargo; it contained only a few ropes and stores (p. 21). It had been fitted up for a steerage just before the steamer left London for Matanzas, and an additional port had been put in on each side forward of the two which had been in her since she was constructed (Shotell, p. 37). The hatch of this No. 1 between-decks or steerage was battened down on leaving Matanzas, and there was no access to the steerage other than the hatch (Clark, p. 20, Nicholson, p. 24).

The hatch was battened down for the purpose of preventing access to the between-decks, there being nothing there which was wanted in the ordinary course of the voyage from Matanzas to Philadelphia.

Clark, master, pp. 20 and 21.

Nicholson, the first officer, says on cross-examination:

"Q. Now, these port lights in the forecastle have shutters, have they? A. Yes, sir.

"Q. But you don't close them? A. No, sir.

"Q. Because you want light in the forecastle? A. Yes.

"Q. Now, you did not need any light in the steerage on that vessel, did you? A. We had to have light going down about our stores.

"Q. But you battened the hatches down there? A. Yes.

"Q. Did you superintend that yourself? A. Yes.

"Q. Did you batten it securely? A. Yes.

"Q. Did you have anything in there that you would need in the ordinary course of a voyage from Matanzas to Philadelphia? A. We had just waste in there and ropes. Still there was nothing that we wanted there.

"Q. Any spars? A. No.

"Q. Ropes? A. Ropes and sails and gear.

"Q. Tackle? A. No.

"Q. Blocks? A. No.

"Q. Don't you keep blocks down there? A. No.

"Q. Where do you keep them? A. In the boat-swain's locker.

"Q. You don't think there was any need of light down there with the hatches battened down? There would have been no difficulty, of course, in closing those shutters? A. No difficulty—if it was necessary."

Record, p. 29.

The Circuit Court of Appeals referred to Lord Blackburn's judgment in the case of Steel *v.* State Line (3 App. Cas., 72). Speaking of this case Judge Wallace says:

"Lord Blackburn expressed the opinion that if the port was in a place where it would be in practice left open from time to time, but was capable of being speedily shut if again required, the vessel could not be said to be unfit to encounter the perils of the voyage; that if when bad weather threatened it was not shut that would be negligence of the crew and not unseaworthiness of the ship."

Opinion of Circuit Court of Appeals, pp 53–4.

We submit that the dicta of Lord Blackburn support our contention that the *Silvia* was unseaworthy rather than the finding of the Circuit Court of Appeals that she was not. Lord Blackburn put the case thus:

"If, for example, this port was left unfastened so that when any ordinary weather came on, and the sea washed as high as the port, it would be sure to give way and the water come in, unless something more was done; if in the inside the wheat had been piled up so high against it and covered it, so that no one would ever see whether it had been so left or not, and

so that if it had been found out or thought of, it would have required a great deal of time and trouble (time above all) to remove the cargo to get at it and fasten it - if that was found to be the case, and it was found that at the time of sailing it was in that state, I can hardly imagine any jury finding anything else than that a ship which sailed in that state did not sail in a fit state to encounter such perils of the sea as are reasonably to be expected in crossing the Atlantic" (p. 90).

Lord Blackburn goes on to say that if the "port had been, as a port in the cabin or some other place would often be, open, and when they were sailing out under the lee of the shore remaining open, but quite capable of being shut at a moment's notice as soon as the sea became in the least degree rough, and in case a regular storm came on capable of being closed with a dead light in such a case," the vessel could not be said to be "unfit to encounter the perils of the voyage."

If the No. 1 between decks of the *Silvia* had been in use as a steerage, as it was subsequently, and if, as the captain puts it, a steward was "going up and down there all the time," there would be no reason why the dummies should not be open; but to batten down the hatch and leave the dummies open was to make the vessel unseaworthy, that is, unfit to encounter the perils of the voyage.

The proofs show beyond question that it was not intended that there should be access to No. 1 between decks during the voyage from Matanzas to Philadelphia; that there was no access; that the very purpose of battening down the hatch was to prevent access. It needs no testimony to show that if rough weather came on it would be a very dangerous thing to attempt to open the hatch.

If the attendance of persons to watch for changes of weather was necessary as a condition of using the ports, provision by the owners for such attendance was essential to make the vessel seaworthy. The owners have no right to cut a dangerous opening in the ship's side, and then say that because they had placed near it an appliance which could be used to make it safe, but which required the attendance of some one especially charged with the duty of using it, they had fulfilled their obligations, unless they have in fact assigned such a person to that special duty. Many steamers have cargo ports in their sides, and lumber vessels have

ports in the bows, which are kept closed by bolts and fastenings which require caulking or rubber packing to make them watertight. Would such a vessel be seaworthy if her owner had provided a bale of oakum and tools to use it, if they had not in fact been used?

3. Since the decision of the Circuit Court of Appeals in this case, the English Court of Appeal has held the vessel unseaworthy upon a state of facts substantially like the present.

Dobell *v.* Rossmore S. S. Co., [1895] 2 Q. B., 408. See Appendix p. 31.

In this case goods were damaged by sea water which came through a port hole closed by the ship's carpenter before the vessel started on her voyage, but in such an imperfect manner that it was not water tight. "The appliances for closing the port hole were sufficient and in good order, and the competency of the ship's carpenter for the duties he had to perform was not disputed." There was no access to the port without removing cargo.

Lord Justice Kay said, among other things:

"It was not denied that she was unseaworthy in fact, and it could not be denied after the decision of the House of Lords in *Steel* v. *State Line Steamship Co.* In that case Lord Blackburn said in effect that if there was a port hole in the ship left unfastened, and the cargo was stowed in such a way that it would take a considerable time to get at the port hole and fasten it, the ship would be unseaworthy; but that if it could be shut directly the necessity arose, the ship could not be said to be unseaworthy; and this view is confirmed by Lord Herschell in the more recent case of *Hedley* v. *Pinkney & Sons Steamship Co.* We have, therefore, the strongest authority for saying that in this particular case the ship was unseaworthy, because it is admitted that this port hole could only be got at during the voyage by shifting the cargo—a matter which would involve a considerable expenditure of time and labor."

The decision of the Circuit Court of Appeals in the present case was referred to in the Rossmore case in the judgment delivered by Lord Esher, as well as in the argument of counsel. It was distinguished, however, by counsel for the plaintiffs, who said:

"The case in the United States Circuit Court of Appeals followed the decision in *Steel* v. *State Line Steamship Co.*, and

it is plain the port could have been got at and closed with the iron cover directly the necessity arose," (p. 412).

As we have shown, this was not the fact.

III.—THE ACT OF FEBRUARY 13, 1893, DOES NOT DO AWAY WITH THE WARRANTY OF SEAWORTHINESS.

1. Whatever may be the meaning of the expression "due diligence to make the said vessel in all respects seaworthy," as used in the 3rd section, it is evident that Congress did not intend to lessen the obligation of vessel owners as to seaworthiness.

The 1st section provides, "that it shall not be lawful for the manager, agent, master, or owner of any vessel * * * to insert in any bill of lading or shipping document, any clause * * * whereby it, he, or they shall be relieved of any liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise."

The 2d section provides, "that it shall not be lawful * * * to insert in any bill of lading or shipping document any covenant or agreement, whereby the obligations of the owner or owners of said vessel to exercise due diligence properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage * * * shall in anywise be lessened, weakened, or avoided."

It is not necessary to analyze the 2nd section grammatically and according to punctuation. As the section is printed in the Statutes at Large and the Supplement to the Revised Statutes, it seems clear that the obligation of the owner is to make his vessel seaworthy and not to exercise due diligence to make her so. This is shown (1) by the use of the plural, *obligations*, not *obligation*, and (2) by the omission of the word "to" between *due diligence* and *properly equip*.

2. Apart from these verbal considerations, it is evident that Congress intended by the 2nd section that the existing obligation of a ship owner to furnish a seaworthy vessel should not be lessened, weakened, or avoided. If Congress had meant to relax this rule, it should have said so in distinct and unequivocal terms.

The warranty of seaworthiness which exists in all contracts of carriage at sea, and in all policies of marine insurance should not be lessened, weakened, or avoided by a free or loose interpretation of a statute. In the case of the *Main* (152 U. S., 122, 132) the Supreme Court held that the limitation of liability statutes should be strictly construed, saying :

"While, from the universal habit of insuring vessels, the application of the statute probably results but rarely in an actual injustice to the owner of an injured vessel, yet, being in derogation of the common law, we think the court should not limit the right of the injured party to a recovery beyond what is necessary to effectuate the purpose of Congress."

The learned District Judge relied on the case of Hedley *v.* Pinkney S. S. Co. (1894, Appeal Cases, p. 222), which he says is a case quite like the present. The provisions of the Merchant Shipping Act, he says, are "equally stringent with our own act, as respects the obligations of the owner to make and keep the ship seaworthy."

There is no analogy between the Hedley case and the case at bar.

Section 5 of the Merchant Shipping Act, 1876, provides that in contracts with seamen "there shall be implied an obligation on the owner of the ship, that the owner of the ship * * * shall use all reasonable means to insure the seaworthiness of the ship for the voyage * * * and to keep her in a seaworthy condition for the voyage."

In the Hedley case the House of Lords had to deal with the question of the liability of a master to a servant. The present case turns on the liability of a carrier to cargo—an entirely different relation. The master has never been an insurer of his servant, and ordinary care and diligence are the measure of his obligation. "All reasonable means to insure the seaworthiness of the ship" for the sailors is a far different thing from the due diligence required of a carrier of passengers or the absolute warranty of seaworthinesss of a carrier of goods.

3. The obligation of seaworthiness includes two distinct ideas. The primary one is that the *vessel* itself shall be fit—*rem ad usum habilem*—a warranty absolute. The other obligation is as to the master, pilot, crew, stores, and supplies. These are not warranted in the same sense as is the ship.

More accurately, the owner's duty is to use due diligence to have a master competent and qualified, a capable and sufficient crew, and that the coal, supplies, and equipment shall have been carefully and properly provided, although the owner does not warrant that they shall actually last through the intended voyage.

The second section of the Harter Act clearly recognizes this distinction.

The 3rd section deals with acts of persons, and contains no exception as to the fitness of the carrying *res*. Its purpose is to relieve against accidental, and even culpable, casualties that may be caused by acts of tne servants of the shipowner when out of his control. The opening clause relating to seaworthiness must be construed as applying to the personal capacity of master and crew, and the supplies and outfit that fall under the owner's duties of due diligence. The exceptions in this 3rd section are twofold: (1) those liabilities for irresistible external force and those defects in the cargo itself, which, unless excepted, might be included in the liability of the carrier as insurer; and (2) those faults and errors personal to the shipowner's servants, however carefully chosen, when beyond the owner's control.

The first are:

dangers of the sea,
acts of God, or public enemies,
inherent defect or vice of the thing carried,
seizure under legal process,
loss resulting from act or omission of the shipper or owner of the goods.

All of which are familiar bill of lading exceptions.

The second are:	Formerly excepted as:
Faults or errors in navigation or management of the ship.	Collisions, strandings, or other accidents of navigation.
Saving life or property by deviation at sea.	Liberty to tow and assist vessels in all situations.

Although the 3d section speaks of defects in the thing *carried*, it does not cover defects in the ship. It does not purport to excuse faults or management of the ship *and cargo*. It

leaves no loop-hole to say that the carrier is let out of liability for his ordinary duties to have a fit ship and to take due care of the property bailed.

To have the meaning now contended, the section would have to read :

If the owner, etc., shall exercise due diligence to make said vessel seaworthy and do all that he can to employ suitable men in order to make her capable of performing her intended voyage, and properly manned, equipped, and supplied, neither the vessel, her owner, etc., shall be held responsible for damage or loss resulting from faults or errors by the persons so selected to prepare the ship, nor for any defects in the ship, which in spite of the owners' diligence may be undiscovered or unknown, whether in hull or machinery, equipment or appliances; or from the omission to close, secure, or fasten the ports, cocks, valves, or pipe connections, or from other omissions of the servants of the shipowner to keep said vessel fit and tight during loading, or to take proper care of the cargo while loading, on said vessel, during its discharge or after landing, and while on any wharf warehouse or quay.

But counsel for the shipowner say we have all this in one word—Management.*

As is shown by the debates in Congress, the statute is aimed mainly at steam vessels. Such a steamship is no longer a mere "structure made to float on the water, whether propelled by sail, steam, or oars." If such a steamship had only means of propulsion, "faults in navigation" might have sufficed.

Besides propelling machinery there is other mechanism intricate and complex, the care of which is no part of the duties of navigation. Such for example are the ventilating and refrigerating engines, and the dynamos and other appliances of a modern mail steamer. To cover faults in the operation of these auxiliary parts, more than the word navigation is needed, especially in view of the settled rule of construction of

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* The appellee's contention is supported by one authority, Lewis Carroll, who says :

"When *I* use a word," Humpty Dumpty said, in a rather scornful tone, "it means just what I choose it to mean—neither more nor less."

"The question is," said Alice, "whether you *can* make words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be master—that is all."—*Through the Looking Glass, p. 124.*

statutes in derogation of the common law. The word management is brought in to remove this doubt and fitly supplements the term navigation.

To argue from this one word, taken from its context, that Congress has undone the ancient liability of shipowners and that the declared intent of the two former sections is thereby nullified is too extravagant to be seriously entertained.

IV.—THE HARTER ACT IS TO BE CONSTRUED IN ACCORDANCE WITH THE STATE OF PRE-EXISTING LAW, THE VARIOUS EFFORTS MADE TO AGREE ON A DIVISION OF THE CARRIERS' LIABILITIES, THE STANDARD FORMS OF BILLS OF LADING WHICH COMMERCIAL BODIES HAD ADOPTED BEFORE 1893, AND THE EXIGENCIES WHICH LED TO THE PASSAGE OF THE ACT.

In construing this statute, this Court has already referred to the recent commercial history of this country and Europe.

The Delaware, 161 U. S., 459, 472.

The efforts at reform in bills of lading, begun in 1881, show that it was always recognized that the shipowner must first make his ship fit for the voyage. Only after such preparation of the vessel, could he claim to be relieved from the faults of his servants in its navigation.

In 1882 the Association for the Reform and Codification of the Law of Nations outlined the basis of a fair division of liabilities between ship and cargo as embodied in bills of lading and contracts of affreightment. The following resolution was then adopted:

RESOLUTION OF 1882.

"That the principle of the common form of Bill of Lading should be this: That the shipowner, whether by steam or sailing ship, should be liable for the faults of his servants in all matters relating to the ordinary course of the voyage, such as the stowage and right delivery of the cargo, and other matters of this kind; but, on the other hand, the shipowner should be exempt from the liability for everything that comes under the head of 'accidents of navigation' even though the loss from these may be indirectly attributable to some fault or neglect of the crew."

A form of bill of lading was accordingly prepared and adopted at the meeting, which contained a negligence clause as to "collisions, strandings, and other accidents of navigation," and other exemptions. This was soon objected to by various influential associations both of English underwriters and various Australian and New Zealand underwriting agencies.

Wendt Maritime Legislation, 3d edition, pp. 398-401.

On October 28, 1884, the New York Produce Exchange dealt with this proposed bill of lading, and the Committee made a report, in which they stated in reference to the special question of shipowners' liability:

"The most important one of these clauses, viz., the exemption of the carrier from liability for losses caused by the default of any servants of the ship, provided the owner or manager has done his duty, has been fully preserved. Your Committee beg to reiterate the statement made by the framers of the bill of lading submitted to them for revision, in which they pointed out that this exemption is in conflict with the doctrine hitherto held by our Federal Courts, though it has for a long time been sanctioned by custom and by the all but general practice of underwriters. Your Committee are equally decided in their opinion that this exemption is demanded by the circumstances under which modern steamship traffic is carried on and that our Federal Courts will not much longer be able to resist a change so eminently just and necessary. *Your Committee may add that the carriers' liability for the seaworthy condition of his ship and for good stowage is in no way affected by these clauses.*"

Wendt, p. 408.

A subsequent meeting held at Lloyds, London, February 4, 1885, reviewed this question. In the attempt to reconcile underwriters and shipowners, Mr. Norwood, Member of Parliament, was reported as saying:

"He, however, ventured to think in the first place that there were many members of Lloyds and subscribing members who were not underwriters, but he also took a broader ground and he thought it a great pity that they should define the relations between the shipowners and underwriters. His view was that they were all, underwriters, shippers and merchants, mutually interested in the settlement of the question. He entirely dissented from the view of Mr. DaCosta

that if the liability of shipowners for negligence, accidents and default of their masters and mates at sea were removed or reduced, there would be a great increase of losses. The position which he took, and which he believed every shipowner took, was that *it was not only his legal, but his moral, duty to make the ship seaworthy, to man her properly*, and to conduct his business so far as the ship was in his control to the best of his ability; and if there was any default on the part of the shipowner in a matter in which he had control he (Mr. Norwood), would be the last to ask to be relieved from the responsibility."

Wendt, p. 413.

Mr. Dale of Liverpool, said:

"In New York, however, (by no means an unimportant commercial community) the principle had been conceded, and though the decisions of the American courts had hitherto been adverse to the shipowners, the steamship owners and shippers combined had agreed on a bill of lading which was satisfactory to both parties. The Liverpool shipowners had recently endeavored to push these concessions somewhat further, and had sought to exempt themselves from responsibility as to *seaworthiness and proper stowage*. That had been resolutely withstood by Liverpool underwriters."

Wendt, p. 415.

Other meetings were had with like effect. The discussions led to nothing definite, until the meeting of the Association for the Reform and Codification of the Law of Nations, under the presidency of Dr. Sieveking, at Hamburg in August, 1885. That conference unanimously adopted the following rule, which is almost the wording of § 2 of the Harter Act:

"It shall not be lawful to insert in the bill of lading any clause, covenant, or agreement whereby the obligations of owners to properly equip, man, provision and outfit the vessel *and to render her seaworthy* and capable of performing her intended voyage shall in any wise be lessened, weakened or avoided; and all provisions and clauses to the contrary shall be null and void and of no effect in law."

Wendt, p. 442.

After the passage of this general resolution, special rules were adopted, known as the Hamburg Rules of Affreightment. The first was:

"1. The shipowner shall be responsible that his vessel is

properly equipped, manned, provisioned and fitted out, *and in all respects seaworthy*, and capable of performing her intended voyage, and for the stowage and right delivery of the goods. He shall also be responsible for the barratry, faults and negligence, but not for errors in judgment, of the master, officers or crew."

Wendt, p. 466.

In September and October, 1885, the Congress called by the Belgian Government at Antwerp passed a still more onerous provision, as follows:

"The owners of ships are civilly responsible to the freighters and shippers for the acts of their captains and their officers relative to the cargo, provided they cannot prove that the damage was caused by *force majeure*, by *vice propre* of the merchandise, or by the fault of the shipper.

"It is, however, lawful for the parties to vary this responsibility by special stipulations, with the following exceptions:

"Owners of ships should be prohibited from relieving themselves in advance of their responsibility by inserting a clause in the contract of affreightment, the bill of lading, or by any other agreement:

"(*a*) For any acts of their captains or their officers tending to compromise the seaworthiness of the ships.

"(*b*) For any act which would cause damage through improper stowage, want of care, or incomplete delivery of the goods confided to their care."

Wendt, p. 477.

The English Committee appointed at the previous London Conferences in December, 1885, reported a proposed Act of Parliament, containing, *inter alia*, the following:

"Any provision or exception in any bill of lading or any agreement purporting to relieve or exonerate in any way any shipowner *from any duty to properly equip, man, provision and fit out any ship and to render it seaworthy*, or from any implied warranty of seaworthiness in a contract of affreightment, shall be null and void."

Wendt, p. 484.

Early in 1886 it was publicly announced that the Chambers of Commerce of Hamburg and Bremen and the Associations of Shipowners in those ports had agreed upon a uniform bill of lading, the first rule of which was:

"The shipowner is responsible for the proper fitting out of

the vessel *and for its being equipped, manned and provisioned and in a seaworthy condition* capable to undertake the intended voyage. Also for errors or negligence of his employees, respecting proper stowage, care, treatment and delivery of the cargo, all agreements and clauses to the contrary to be null and void with no legally binding force."

Wendt, p. 490.

At the meeting of the Association for the Reform and Codification of the Law of Nations, held at the Guildhall, in London, July 25, 1887, the following resolution was adopted :

RESOLUTION OF 1887.

" That the following principle adopted by the Conference of this Association held at Liverpool in 1882 be now confirmed and adopted as the basis of discussion : that the principle of the common form of bill should be this :—That the shipowner whether by steam or sailing ship should be liable for the faults of his servants in all matters relating to the ordinary course of the voyage such as the stowage and right delivery of the cargo and other matters of this kind ; but on the other hand, the shipowner should be exempt from liability for everything which comes under the head of accidents of navigation, even though the loss from these may be indirectly attributable to some fault or neglect of the crew."

Wendt, p. 493.

The British Royal Commission on Loss of Life at Sea made their report on August 27, 1887, in which they made the following recommendation :

" We think no shipowner ought to be relieved by contract or otherwise *from the legal obligation to properly equip, man, provision, outfit, and render said ship seaworthy for performing her intended voyage*, nor from the legal obligation to properly stow and deliver her cargo, as agreed by the terms of shipment (except as to the stowage of chartered vessels loaded under direction of the charterers)."

And under the final summary of recommendations, the following :

" 12. That any provision in a bill of lading or other agreement having for its object or effect to avoid or limit the liability of the shipowner in respect to goods shipped under it, should have no legal validity *if the loss has been occa-*

sioned by the ship having been sent to sea in an unseaworthy condition, unless he proves that he or those to whom he commits the management of his business, used all reasonable means to make and keep the vessel seaworthy."

In July, 1888, the Northern Maritime Conference assembled at Copenhagen, with delegates from the Scandinavian countries, including Finland, and, among other points, discussed the progress of bill of lading reform, more particularly the resolution twice adopted by the Association for the Reform and Codification of the Law of Nations. In the publication by their committee they stated :

"By this resolution result has been arrived at which on the whole agrees with that which in the meantime had been adopted by similar transactions in the United States of America, and which in our opinion is as good as it is possible to attain by private exertion, as the shipowners retain responsibility for everything respecting the equipment and *seaworthiness* of the ship, the stowing, preservation and proper delivery of the cargo, but are exempted from all consequences of accidents occurring during the voyage, whether they are a consequence of *vis major* or of the faults or errors of the master or crew."

> Memorandum prepared by Committee of the Second Northern Maritime Conference, Copenhagen, 1888, p. 33.

In October, 1892, the Association for Reform and Codification of the Law of Nations met at Genoa. (On June 10, 1892, Mr. Harter had offered in the House of Representatives his bill (H. R., 9176) which, as finally revised and modified in committee, became the Act of February 13, 1893.) Four months afterwards Mr. McArthur, of Liverpool, in addressing the Association, said :

"A bill has been introduced into Congress which has been favorably reported upon by a committee of the House of Representatives by which it is proposed that the shipowner shall be relieved of all responsibility for loss or damage to cargo resulting from error of judgment in the navigation or management of the vessel, *if it is true that she was in all respects seaworthy on sailing.*"

This summary of the efforts of publicists, associations of commercial men, shipowners, and underwriters to bring about

a reform in bills of lading, and the practical basis of agreement reached, shows that the seaworthiness of the ship was recognized, first and last, as the condition of any relief from the subsequent negligence of the servants of the shipowner. The proceedings in Congress resulting in the passage of the Harter Act are but a ratification of the agreement reached by these associations in the great maritime centres of Europe.

V.—BUT IF THE SEVERITY OF THE OBLIGATION WHICH HAS HERETOFORE RESTED ON THE SHIPOWNER TO FURNISH A SEAWORTHY SHIP HAS BEEN RELAXED, THE STRICT OBLIGATION OF DILIGENCE SUBSTITUTED THEREFOR HAS NOT BEEN SATISFIED BY THE OWNERS OF THE SILVIA.

Manifestly the burden is on the person seeking to avail himself of the exemption afforded by the statute to show strict compliance with the conditions expressly required.

Especially where the application of the statute is in derogation of the common law.

The *Main*, 152 U. S., 122, 132.

In this case, unlike others which have recently been brought into this Court by *certiorari*, the shipowner has failed to make even *prima facie* proof of the exercise of diligence.

Thus in the case of the *Delaware* (161 U. S., 459), where no claim was made that the ship was defective in any respect when she started on her voyage, the shipowner took the testimony of the Marine Superintendent of the owners for the purpose of proving that diligence was used by them to make the ship in all respects seaworthy, etc. The present is the only case of those in which the Harter Act has been invoked as a defense where the owners have made no effort whatever to prove the exercise of diligence.

The only evidence adduced by the appellee is as follows:

"Q. In what sort of general navigable condition was this vessel maintained by the owners? A. First class.

"Q. Was she wanting in any respect so far as you know? A. No, sir."

Clark, p. 11.

In view of the fact that new ports had been put in in London on the previous voyage, it was especially incumbent upon the claimant to prove the exercise of due diligence.

Yet on this evidence the District Judge assumed the exercise of due diligence, and the Circuit Court of Appeals followed him in this assumption.

The District Judge said:

"In supplying the usual iron covers, the owners had used due diligence to make the ship seaworthy, as regards these ports, and fulfilled their obligations in this regard under the act of February 13, 1893, so as to bring themselves under its protection."

Opinion of District Judge, p. 49.

The learned Judge thus assumed the very thing to be proved. He assumed that the port thus broken was a "proper" port, that the glass was a "proper" glass.

So the Circuit Court of Appeals said: "In the present case the vessel owners certainly did exercise due diligence to make the vessel seaworthy."

Opinion of Judge Wallace, p. 55.

The present case was the first decision on the Harter Act in a suit for damage to cargo. The learned District Judge has since considered the Act many times, and has adopted a much severer standard of diligence than that applied in this case, and has required far more stringent evidence thereof.

In the *Millie R. Bohannon* (64 Fed. R., 883), he said:

"'Due diligence' requires a carefulness of inspection and repair proportionate to the danger. The *Edwin I. Morrison*, 153 U. S., 199, affirming 27 Fed., 136. The sudden and heavy leaks, when a few days out of port, on mere rolling in a calm, are as inconsistent with 'due diligence' to make the centreboard seam tight as they are inconsistent with seaworthiness, *i. e.*, reasonable fitness for the voyage. '*Res ipsa loquitur.*'"

In the *Sintram* (64 Fed. R., 884), he said:

"The evidence shows all reasonable and customary care and diligence to make the ship sufficient, so far as human foresight could perceive before sailing; that the regulations in that

regard at Hong Kong are among the most stringent; and that the surveyors of the insurers of cargo inspected the vessel and suggested nothing further to be done; and that she rated in the highest class."

In the *Mary L. Peters* (68 Fed. R., 919), he held "that there was no such 'due diligence' exercised by the persons employed by the owners to see to the repair of the ship as to exempt the ship and owners"

In the *Flamborough* (69 Fed. R., 470), he held that the shipowners were chargeable with any negligence of their agents appointed to inspect the steamer.

In the *Alvena* (74 Fed. R., 252), he said:

"The requirement of 'due diligence,' however, is not satisfied by the mere appointment of competent persons to repair. Due diligence in repair and equipment must be exercised in fact."

In the *Colima* (82 Fed. R., 665, 678), he said:

"This section" (the 3rd section of the Harter Act) "has been in several cases adjudged to require due diligence, not merely in the personal acts of the owner, but also on the part of the agents he may employ, or to whom he may have committed the work of fitting the vessel for sea. The act requires, in other words, due diligence in the work itself. The *Mary L. Peters*, 68 Fed., 919; The *Flamborough*, 68 Fed., 470; The *Alvena*, 74 Fed., 252, affirmed 23 C. C. A., 261, 79 Fed., 973; The *Rossmore* [1895], 2 Q. B., 408. On any other construction, owners would escape all responsibility for the seaworthiness of their ships by merely employing agents of good repute, whether any diligence and care to make their vessels seaworthy were in fact exercised or not. On reason and sound policy no such intent in the statute can be supposed. The context and the pre-existing law indicate that the intent of the act is to relieve the shipowner from his previous warranty of absolute seaworthiness in fact, and to substitute for that warranty a warranty only of diligence to make the ship seaworthy. This difference is of great importance, as it avoids responsibility for latent and undiscoverable defects. *But the warranty of diligence remains; and this requires the application of the usual rule, that the acts and negligences of the agent are deemed those of the principal.*

"From other language in the third section of the acts the same result follows. For it exempts only from losses by fault 'in the navigation or management' of the vessel, and from

'dangers of the sea.' But a danger of the seas (the clause here invoked), by its settled meaning, *does not include a danger which would have been avoided by the use of due diligence in loading* or management, and that part of the section would therefore not apply."

VI.—THE OMISSION TO CLOSE THE DUMMY WAS NOT A FAULT OR ERROR IN NAVIGATION OR IN THE MANAGEMENT OF THE VESSEL UNDER SECTION 3 OF THE HARTER ACT.

Plainly it had nothing to do with the *navigation* of the ship.

In the strict sense of the word it did concern the management of the ship. But the words *navigation* and *management* are used to indicate the same or nearly the same thing. Management means *nautical* management.

In the act as it passed the House, the words were "for damage or loss resulting from error of judgment in navigation, or in the management of said vessel, *if navigated with ordinary skill and care*, from the time of her leaving her usual place of loading on her intended voyage until her arrival at the usual place of discharge at her port of delivery, nor shall the owners, etc."

The clause italicized shows that the word *management* was used in order to make it clear that the word *navigation* was not used in its technical sense as limited to directing the course of the ship by taking observations, etc., etc., but in the broader sense of making a voyage, which would include management of the vessel for the purpose of navigating her, in other words, seamanship, etc.

The title of the act tends to confirm this view—"An Act relating to *navigation* of vessels, etc."

Navigation:

"(*a.*) The science or art of directing the course of vessels as they sail from one port of the world to another. The management of the sails, etc., the holding of the assigned course by proper steering, and the working of the ship generally pertain rather to seamanship, though necessary to successful navigation. The two fundamental prblems of navigation are the determination of the ship's position at a given moment

and the decision of the most advantageous course to be steered in order to reach a given point."

The Century Dictionary.

"Navigation is (*a.*) the science or art of conducting ships or vessels from one place to another, including more especially, the method of determining a ship's position, course, distance passed over, etc., on the surface of the globe, by the principles of geometry and astronomy. (*b.*) The *management* of sails, rudder, etc., the mechanics of travelling by water; seamanship."

Webster's Dictionary (1897).

The Standard Dictionary, Vol. II., under *Navigation*, states:

(2.) "The *management* of the sails, steering apparatus, etc., or the working of a ship generally, more properly seamanship."

Some of the English cases have extended the use of the word navigation so as to cover anything done before or during the voyage for the purpose of navigation. Thus it has been held that leaving open a sea-cock, or having a cargo port insufficiently fastened, or omitting to have the rudder fastened with a proper pin are matters of improper navigation.

Good *v.* London Association, L. R., 6 C. P., 563.
Carmichael *v.* Liverpool Assoc., 19 Q. B. D., 242.
The *Warkworth*, 9 P. D., 20; on appeal, *ib.*, 145.

The first two cases were against indemnity associations on their agreements to indemnify the owners of a steamship against any loss or damage "which, by reason of the *improper navigation* of any such steamship, may be caused to any goods, etc., on board such steamship."

The *Warkworth* was a limitation of liability proceeding, in which the defendants pleaded that the damage was not caused by reason "of any improper navigation of the *Warkworth* within the meaning of the Merchant Shipping Act, 1862, §54, sub-sec. 4."

In one of the cases cited Lord Esher said that "if there be negligence before the navigation of the ship commences—negligence of the owner or his servants—which has the effect of

causing the ship to be unsafely navigated during the navigation with regard to the safety of the goods, that makes the navigation under those circumstances improper navigation by the ship-owner, or those for whom he is liable."

Carmichael *v.* Liverpool Assoc., 19 Q. B. D., 248.

There are no decisions in this country which go so far as these English cases, and we submit that in interpreting a statute this Court should adopt a principle of interpretation applied by the English Courts to an insurance or indemnity contract.

But the English courts themselves have taken a different position in interpreting these words in contracts of carriage.

Thus in *The Ferro* [1893], P. 38, Sir Gorell Barnes said:

"I think it is desirable also to express the view which I hold about the question turning on the construction of the words 'management of the ship.' I am not satisfied that they go much, if at all, beyond the word 'navigation.' Some things may be suggested to which the word 'management' is, perhaps, applicable beyond that of 'navigation,' but I feel that it is not such clear and expressive language as to include within it the words 'improper stowage.' It seems to me a perversion of terms to say that the management of a ship has anything to do with the stowage of a cargo."

And in *Dobell* v. *S. S. Rossmore Co.* [1895] 2 Q. B. 408, 415, Kay, L. J., said:

"It was argued that the damage to the cargo was less or damage resulting from faults or errors in navigation or in the management of the ship. It does not seem to me to be necessary to give any decided opinion on this point; but I incline to think, contrasting the various clauses of the bill of lading, that the expression 'faults of errors in navigation or in the management of the said vessel' applies rather to faults or errors in sailing the vessel, or in managing the sailing of the vessel, than to a matter of this kind."

And in the same case A. L. Smith, L. J., said:

"It is not necessary to decide what is the interpretation of the expression 'faults of errors in navigation or in the management of the vessel.' I may say, however, that I think that the meaning of the section is that, if the shipowner by himself or his agents uses due diligence to make the ship sea-

worthy when she starts, he shall not be liable for what happens afterwards when the ship is at sea and he has no more control over her."

In the case of *The Glenochil* [1896], P. 10, after the arrival of the vessel at her port of destination and during the discharge of the cargo, the engineer ran water into a ballast tank in order to stiffen the ship, but negligently omitted to ascertain the condition of the sounding pipe and casing, which had, owing to heavy weather during the voyage, become broken. The Divisional Court held the ship-owner exempt from liability by reason of the Harter Act, holding that this damage resulted from a fault in the management of the vessel and the operation of the exemption as to management extended to the period during which the cargo was being discharged. In his judgment Sir Francis Jeune emphasized the distinction between what occurs before the beginning of the voyage and what occurs during the voyage. He says:

"Now, is this a fault in the management of the vessel within the meaning of the bill of lading? It is not necessary to deal with it as a question of navigation. It is sufficient to deal with it as a question of management. It is said, however, that the two things are one and the same, and that management and navigation mean the same thing, because the management is only in the navigation; and no doubt upon that a formidable argument arises, for it is put upon a dictum, though only a dictum, of Kay, L. J. It is said that that learned Judge expressed the view (1) that, 'contrasting the various clauses of the bill of lading,' the expression 'faults or errors of navigation or in the management of the vessel' applies rather to faults or errors in sailing the vessel, or in managing the sailing of the vessel, than to matter of this kind. But when one considers what the matter then in question was, namely, that it was something antecedent to the commencement of the voyage, although part of the cargo had been put in, and that it was a fault connected with the construction of the ship, or, at any rate, the seaworthy condition of the ship, one sees, I think, that what the Lord Justice really had in his mind was not a contrast between the management of the vessel while sailing and while lying in harbour, but rather a contrast between the state of the ship, as a matter of seaworthiness, and mismanagement of the ship during the voyage. That, I think, is not an unreasonable view to put upon the Lord Justice's words; and it seems to me clear that the word 'management' goes somewhat beyond—perhaps not much beyond—navigation, but far enough to take in

this very class of acts which do not affect the sailing or movement of the vessel, but do affect the vessel herself. This Court had before it the same sort of question in the case of *The Ferro*, and I adhere to what I said then, that mere stowage is an altogether different matter from the management of the vessel. It may be that the illustration I gave in that case, as to the removal of the hatches for the sake of ventilation, was not a very happy one; but the distinction I intended to draw then, and intend to draw now, is one between want of care of cargo and want of care of vessel indirectly affecting the cargo."

(1) Dobell *v.* Steamship Rossmore Co. [1895], 2 Q. B., 408, at p. 415.

This distinction between acts occurring before the beginning of the voyage and those occurring during the voyage is fundamental.

In the case of *Steel* v. *State Line S. S. Co.* (L. R., 3 App. Cas., 72), the exceptions of the bill of lading were very broad:

"Not responsible * * * for any of the following perils, arising from the negligence, default or error in judgment of the pilot, master, mariners, engineers or persons in the service of the ship, or for whose acts the shipowner is liable or otherwise."

The Lord Chancellor (Cairns), in his judgment, said, in relation to the stipulation: "Looking at all that is mentioned between those two termini in the bill of lading, it appears to me that everything which is mentioned is matter subsequent to the sailing of the ship with the goods on board" (p. 78).

This distinction is brought out with great clearness by the continental authorities, several of which are cited in the brief for the appellant in the case of the *Carib Prince*, No. 45.

4. The sugar damage was not a "damage or loss resulting from fault or error in navigation or in the management" of the vessel. It resulted from the unseaworthiness of the ship.

Under the strict construction required by the authorities, if the damage, although due in part to an error in the management of the *Silvia*, would not have occurred had the ship been seaworthy, then the ship cannot escape liability.

In order to avail himself of the statute it is not enough for

the shipowner to show that the loss may have resulted from a fault or error in navigation or in the management of the vessel. He must show (1) that he has exercised due diligence to make his vessel seaworthy, and (2) that the loss or damage did not result from unseaworthiness, but from an error in navigation or in the management of the vessel.

VII.—By the absolute undertaking in the charter party to have the ship fit for the voyage, the claimant has precluded itself from any exemption under the Harter Act.

The charter party (p. 5 and pp. 44–6), the provisions of which the claimant has invoked as a defense in its answer (p. 3), provides expressly that the vessel shall be "tight, staunch, strong and in every way fitted for such a voyage" (p. 44). This is equivalent to an absolute warranty that she is so.

The Edwin I. Morrison, 153 U. S., 199.

In the case of Hine *v.* The N. Y. & Bermudez Co. (68 Fed. R., 920), Judge Brown said:

"The Harter act does not interfere with the liberty of contract in regard to the proper fitting of the vessel for the voyage, or with any contract the parties may make as respects the responsibility for the sufficiency of special fittings, or as regards other matters not within the prohibition of that act."

And in the case at bar Judge Wallace said:

"Doubtless the act does not prevent the carrier from waiving by contract with the cargo owner those provisions which relax his ordinary obligations. He may do so by a charter party or bill of lading containing an express warranty of seaworthiness, or by a foreign contract with the provision that it shall be governed by the law of the place of the contract."

Record, p. 55.

But in the present case both the District Court and the Circuit Court of Appeals have relieved the shipowner from an obligation deliberately assumed by him in the charter.

VIII.—The decree of the Courts below should be reversed and the cause remanded to the District Court of the United States for the Southern District of New York, with directions to enter a decree for the libellant, with costs.

February, 1898.

Harrington Putnam,
Charles C. Burlingham,
Advocates.

APPENDIX.

DECISION OF THE COURT OF APPEAL IN G. DOBELL & CO. *vs.* S.S. ROSSMORE COMPANY. (Law Reports [1895] 2 Q. B., 408.)

Appeal from the judgment of LAWRENCE, J., at the trial of the cause without a jury.

The action was by the owner of goods shipped under a bill of lading at Baltimore for delivery in Liverpool and damaged in transit. It was admitted at the trial that there was a porthole to the ship above the water-line for use in loading cargo, and that if properly caulked and tightly screwed down it would not admit water when the vessel was at sea. Before she started on her voyage the porthole was closed by the ship's carpenter, but in such an imperfect manner that it was not watertight, and during the voyage, as the porthole was submerged from time to time by the rolling of the vessel, water got in through it and damaged a part of the cargo. The appliances for closing the porthole were sufficient and in good order, and the competency of the ship's carpenter for the duties he had to perform was not disputed. The part of the ship into which the porthole opened was filled with cargo which would have to be removed before access could be obtained to the porthole. The bill of lading contained the following clauses: "Neither the vessel, her owners, agents or charterers shall become, or be held responsible for damage, or loss resulting from faults, or errors in navigation, or in the management of said vessel, provided due diligence has been exercised by her owners to make said vessel in all respects seaworthy, and properly manned, equipped and supplied * * * not accountable for the unseaworthiness of the vessel at the commencement of the voyage (provided all reasonable means have been taken to provide against such unseaworthiness) or otherwise howsoever. It is also mutually agreed that this shipment is subject to all the terms and provisions of, and all the exemptions from liability contained in the Act of Congress of the United States, approved on the 13th day of February, 1893."

[Here follows the Act of Congress.]

The learned Judge gave judgment for the plaintiffs.
The defendants appealed.

Lord Esher, M. R.: This case arises on a bill of lading of goods which were to be brought from America to England, and which were damaged on the way by reason of water having got into the ship through a porthole. The shipper of the goods has brought an action in respect of the damage done to them, and the shipowner contends that he is not liable, as the case comes within the exceptions of the bill of lading. That document has brought in by reference the provision of an American Act of Congress, and what we have to do is to construe the bill of lading, reading into it as if they were written into it the words of the Act of Congress. If this is done it will have this effect: that some provisions will appear twice over, because they have put words extremely like those of the Act into the bill of lading, and then introduced the whole of the Act. That would, of course, do no harm, but it is clumsy to the last degree.

The bill of lading has these words in it by way of exception, "Neither the vessel, her owners, agents or charterers shall become, or be held responsible for damage, or loss resulting from faults, or errors in navigation, or in the management of said vessel," followed by this proviso, "provided due diligence has been exercised by her owners to make said vessel in all respects seaworthy, and properly manned, equipped and supplied." The matter stands then, that unless the conditions of the proviso are fulfilled the exceptions which precede do not apply. They then introduce into their bill of lading the words of the Harter Act, which I decline to construe as an Act, but which we must construe simply as words occurring in this bill of lading. In the 3rd section of the Act so incorporated the exception which is to relieve the shipowner is made to depend on the condition that the owner of the ship—that is, the owner of this particular ship—shall exercise due diligence to make the vessel in all respects seaworthy. If he does not do that the exceptions in his favor do not take effect. It is contended that the meaning of the clause is that if the owner personally did all that he could do to make the ship seaworthy when she left America, then, although she was not seaworthy, by the fault of some agent or servant, the owner is not liable. Can that be the meaning of the contract with regard to this ship? The owner was not at the port from which the ship sailed. The company who own the ship cer

tainly was not there, and could not be there; but neither was the manager, or managing director, or some other person who might represent the company. No one was there who could possibly be called the owner; and this was known to both parties to the contract. It is obvious to my mind, from a consideration of the facts of this case, that the words of the third section which limit the owner's liability if he shall exercise due diligence to make the ship in all respects seaworthy, must mean that this is to be done by the owner by himself or the agents whom he employs to see to the seaworthiness of the ship before she starts out of that port. Now, who was the agent at the port who was to look after the ship? If there was an agent there who employed the ship's carpentor he ought to have overlooked the carpenter and seen that the ship was seaworthy. If it was the carpenter who was the agent for this purpose, then it was his duty to see that the ship was seaworthy when she started. If she was not seaworthy when she started, it was the fault either of the agent employed to look after the carpenter or of the carpenter himself. In either case, there was a person employed by the owner, or on behalf of the owner, to see to the fulfilment of the condition that the owner had taken on himself by his contract, that the ship should be seaworthy when she started.

Now comes the question. Was the ship seaworthy when she started? There was a porthole through which water could come. If that had been all, and there had been the means of immediately closing the porthole, the matter would have been otherwise. But here there were no facilities for closing the porthole, for it could only be closed after the removal of a considerable part of the cargo; so that if there were rough weather or a storm, the water would be coming in all the time until the porthole could be got at and closed. It seems to us impossible to say that she was seaworthy at starting, so that she could perform an ordinary voyage without damage to the cargo. Her unseaworthiness was the fault of some one employed by the owner as his agent, for the purpose of making the ship seaworthy before she started. That is the same as if the owner himself had been guilty of the negligence complained of. In this view of the case, neither *Carmichael* v. *Liverpool Sailing Shipowners' Mutual Indemnity Association* (1), nor the decision in the case cited from the United States Circuit

Court of Appeals, have any bearing on the matter. (The *Silvia.*) I do not think we are derogating from our decision in the former case. This particular case is peculiar to itself. The owner was not relieved from his responsibility, and the judgment of the learned Judge at the trial must be supported.

(1) 19 Q. B. D., 242.

KAY, L. J.: This bill of lading must be read as if the words of the Harter Act were set out at length in it. I confess my opinion as to the meaning to be placed on it has somewhat fluctuated during the argument; but upon the whole I think the result is that the owner of the ship meant, upon a certain condition, to exempt himself from the effect of any damage or loss resulting from faults or errors in navigation or in the management of the vessel. I agree with the argument that this means during the voyage, because of the contrast with the condition on which the exemption is given, by which the owner is to exercise due diligence to make the vessel in all respects seaworthy, and properly manned, equipped and supplied.

The second point argued was that what happened was a fault in navigation or in the management of the vessel. There was a porthole in the ship intended to facilitate the loading of cargo. It was supplied with a cover which could be fastened down, so as to prevent water getting into the ship. The equipment was all perfectly right; but water got in because the porthole was insufficiently closed, and so the cargo was damaged. It was argued that the damage to the cargo was loss or damage resulting from faults or errors in navigation or in the management of the ship. It does not seem to me to be necessary to give any decided opinion on this point; but I incline to think, contrasting the various clauses of the bill of lading, that the expression "faults or errors in navigation or in the management of the said vessel" applies rather to faults or errors in sailing the vessel, or in managing the sailing of the vessel, than to a matter of this kind.

The main question in the case is whether the owners fulfilled the condition upon which they are entitled to exemption, by the exercise of due diligence to make the vessel in all respects seaworthy, and properly manned, equipped, and supplied. It

was not denied that she was unseaworthy in fact, and it could not be denied after the decision of the House of Lords in *Steel* v. *State Line Steamship Co.* (1). In that case Lord Blackburn said in effect that if there was a porthole in a ship left unfastened, and the cargo was stowed in such a way that it would take a considerable time to get at the porthole and fasten it, the ship would be unseaworthy; but that if it could be shut directly the necessity arose, the ship could not be said to be unseaworthy; and this view is confirmed by Lord Herschell in the more recent case of *Hedley v. Pinkney & Sons Steamship Co.* (1). We have, therefore, the strongest authority for saying that in this particular case the ship was unseaworthy, because it is admitted that this porthole could only be got at during the voyage by shifting the cargo—a matter which would involve a considerable expenditure of time and labour.

The essential question then is. Was there want of due diligence on the part of the owners?

(1) 3 App. Cas., 72.
(1) [1894.] A. C., 222.

It is said that they did all that they could by providing proper equipment and appointing proper agents. It was the duty of the ship's carpenter to close this porthole, and they appointed a carpenter to whose competence no one makes any objection. It is said, therefore, that they personally exercised diligence, and thereby fulfilled the condition. I do not agree with this contention. It seems to me to be plain on the face of this contract that what was intended was that the owner should, if not with his own eyes, at any rate by the eyes of proper competent agents, ensure that the ship was in a seaworthy condition before she left port, and that it is not enough to say that he appointed a proper and competent agent. It is obvious that the shipowner cannot himself with his own hands make the ship seaworthy; he must act through other persons; but I do not read the contract as exempting him from liability in the case of the negligence of the agents whom he employs to act for him in this respect. It seems to me that the owner has not fulfilled the whole of his duty within the terms of the contract merely by appointing a competent shipwright, and that he has not fulfilled the condition upon which alone he is entitled

o exemption. I think, therefore, that the learned Judge was tright in holding that the owner was liable.

A. L. Smith, L. J. : This is an action by the owner of goods against the shipowner on a bill of lading for damage to cargo, and the defence is that the latter is exempt by the terms of the bill of lading. There can be no doubt on the authorities that when the ship started on her voyage she was unseaworthy, but the defendant still claims to be exempt. The material part of the bill of lading is the clause which incorporates the Act of Congress of February 13, 1893, and the bill of lading must be construed as if the provisions of that Act were actually incorporated into it.

That brings me to consider what is the meaning of the sections of the Act. The purview of ss. 1 and 2 is that the shipowner shall not put into the bill of lading any clause exempting himself from damage to cargo by reason of the negligence of himself or his servants. As I read clause 3, it is a provision in favor of the shipowner, just as the first two clauses are directly against him. In clause 3 what is the meaning of the expression, "If the owner shall exercise due diligence to make the vessel in all respects seaworthy"? Does it mean by himself, with his own hands and eyes? If that be the meaning of the clause, it could hardly be applied in one case out of fifty, for evidently the shipowner is not upon the spot to see to the matter. In my opinion it does not mean by himself personally, but by himself and his agents ; so that if by himself and his agents he exercises due diligence to make the vessel seaworthy, then he is not to be liable for loss or damage resulting afterwards from faults or errors in navigation or in the management of the vessel.

To get himself within the exemption which is in his favor the shipowner must make out that he has by himself or his agents exercised the due diligence which is required. In this case he cannot do so, because his agent in that behalf, as I understand the carpenter to be, has omitted to do that which a reasonably diligent man would do, and has let the ship go to sea with a porthole partially open, and with cargo stowed against it, so that it could not be got at without much labor and loss of time. It seems to me, therefore, that the defend-

ants in this case have not brought themselves within the provision which would be an answer to this action.

It is not necessary to decide what is the interpretation of the expression "faults or errors in navigation or in the management of the vessel." I may say, however, that I think that the meaning of the section is that, if the shipowner by himself or his agents uses due diligence to make the ship seaworthy when she starts, he shall not be liable for what happens afterwards when the ship is at sea and he has no more control over her.

We have been pressed with the case *Carmichael* v. *Liverpool Sailing Shipowners' Mutual Indemnity Association*; but the sole point decided in that case was whether or not, upon a policy of insurance covering goods against losses which were incurred by the improper navigation of the ship carrying the goods, the fact of the ship sailing with a porthole partially closed was improper navigation of the ship. My brother Wills and myself held that it was, and our view was upheld by the Court of Appeal; but that decision has no application to this case, and for these reasons I think the defence fails.

Appeal dismissed.

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Supreme Court of the United States,

October Term, 1897.

FRANKLIN SUGAR REFINING COMPANY, Libelant-Appellant, AGAINST The Steamship SILVIA, Claimaint-Appellee.	No. 79.

BRIEF FOR THE SILVIA.

STATEMENT.

This cause was brought into this Court by a writ of *certiorari*, issued November 19, 1895 (p. 57), to review a final decree of the United States Circuit Court of Appeals for the Second Circuit, entered June 5, 1895, (p. 57), which affirmed a final decree of the District Court for the Southern District of New York, dismissing the libel, with costs (p. 50).

The libel was filed to recover damages to a consignment of 13,227 bags of centrifugal sugar on a voyage of the Silvia from Matanzas to Philadelphia in February, 1894.

The *Silvia* is an iron ship of 1,104 tons net register, built in Newcastle, England, about 1884. She was classed in Lloyds 100 A1. Her length is 225 feet; beam, 34 feet; depth of hold, about 28 feet. She was a first class ship in

every respect (p. 5), was maintained in the best of navigable condition, and on this voyage was not wanting in any respect (p. 11). She was in command of Captain Joseph Clark, a shipmaster of sixteen years' experience (p. 5). He had served in five other steamers (p. 7).

The libel alleges that the goods were carried under and pursuant to the terms of a bill of lading, issued by the master, reciting the shipment of the sugar in good order and condition, and providing for its delivery in like good order and condition at Philadelphia, the "dangers of the seas only excepted," unto the order of the American Sugar Refining Company, or to their assigns (pp. 1, 2). The libel makes no reference to any charter-party or other shipping document.

The bill of lading was substantially in the form alleged (p. 46).

The allegation of fault on the part of the vessel was as follows (p. 1):

"Said damage was caused by the failure of the owners of said vessel to exercise due diligence to make said vessel in all respects seaworthy, and to the failure of said vessel and those in charge of said vessel to take proper care of the cargo, especially in that they did not properly secure the sidelights of said vessel and allowed said vessel to go to sea with one of her sidelights improperly closed, or with no proper shutter fitted thereto, and after the said glass had been broken, instead of using due diligence in repairing said sidelight, allowed the same to admit sea water, to the damage of said cargo, and in other faults which the libelant will show at the trial of this cause."

These charges were denied in the answer, which further alleged (*a*) that the losses were by a danger of the sea, (*b*) were within the exemptions provided by the third section of an act relating to navigation of vessels, bills of lading, &c., approved February 13, 1893 (Harter Act).

The damage complained of resulted from the inflow of sea water through a broken side port into the No. 1 between-decks, which was fitted up as a steerage (Barrett, p. 42). It then drained down into the lower holds, where it overflowed the bilges, wetting and injuring the sugar.

The steerage compartment was in No. 1 between-deck, and was fitted with four round ports on each side, eleven feet above the water line as the vessel was trimmed on that voyage (p. 19). The ports were eight inches in diameter, constructed in the usual way, and when closed and secured were watertight. A five-eighths inch glass was set in a brass frame hinged to the ship's side, and which swung inwards on a horizontal plane. The glass ports were protected on the inside by iron dummies, blinds, or dead-lights, hinged at the top, which were also watertight. When closed and secured these dummies would make the ship's side watertight even if a glass port were broken.

A line of similar ports extended from the steerage to the stern of the ship, on each side, opening into all the between-deck compartments, and there were similar ports on the same level in the forecastle as well as in the cabin aft.

No passengers were carried in the steerage on the voyage from Matanzas to Philadelphia, part of the spare tackle, gear and some ship's stores were in the compartment. There was ready access to the steerage from the main deck by means of a stairway down the No. 1 hatchway. It was apparently expected that some of the officers or crew would be in the steerage for ship's purposes from time to time during the voyage. There was no cargo in the compartment, and hence the officers, on sailing, though careful to see that the glass ports were closed and secured, did not close the iron dummies or dead-lights.

The blinds could have been closed when the ship left Matanzas, but they were left open by design. "We "wanted to go down there at any time for stores, oils, "lights, and so on" (Clark, p. 14). "We had to have "light going down about our stores" (Nicolson, p. 29). "There was perfectly easy access to that steerage at all "times during this voyage" (Clark, p. 14). "It only took "a couple of minutes to open the hatch and go down" (Nicolson, p. 30).

The ship sailed from Matanzas on February 16, at 6 A. M. The material events of the day are set forth in the Protest, as follows (pp. 47, 48):

"10 A. M. Strong breeze, with heavy head sea, ship laboring and pitching heavily and shipping heavy water

over all. At 3 P. M. second engineer reported water draining through bulkhead doors into stoke hole. Called all hands and took off No. 1 and 2 hatches, and found that the sea had broken the glass in the forward port on starboard side of the steerage, which port was located near the bluff of the bow. The frame was securely fastened, but glass gone. * * * On the previous day, when making ready for sea, an examination was made of all ports, and same found in good order and secure. It was also found that the sea broke one of the ventilator flanges about the same time when the broken port was found, also funnel flanges for forecastle. February 17th: Same weather 1 A. M. No. 2 tarpaulin damaged by seas. At 4 A. M. gale slightly moderating, but still shipping heavy seas and pitching badly."

The weather is described to the same effect in the evidence of the witnesses (Clark, pp. 9, 11, 19; Nicholson, p. 25; Shotell, p. 36).

Immediately upon discovery that the glass port was broken the iron dummy provided for the protection of that porthole was closed (p. 36). It made the porthole watertight (p. 7). No further water entered during the voyage (p. 18).

In the District Court it was held (1) that the officers were negligent in omitting to close the iron cover of the port prior to sailing, with the hatch leading to that compartment battened down; (2) that the ship was unseaworthy for the voyage with the dummies open; but (3) this was due to no want of due diligence of the owner, but was a fault in management of the ship, and that the exemption provided by the third section of the Harter Act applied and relieved the ship (64 Fed. Rep., 607).

Judge Brown stated his conclusions as follows:

"In supplying the usual iron covers, the owners had 'used due diligence to make the ship seaworthy' as regards these ports, and had fulfilled their obligations in this regard under the Act of February 13, 1893, so as to bring themselves within its protection. Although the ship sailed from Matanzas in an unseaworthy condition, from the fact that the hatches were battened down without the closing of the iron coverings of the port below,

that was not the owner's fault. The duty to close the iron covers to prevent the breakage of the glass and the ingress of sea water, was a duty appertaining exclusively to the 'management of the vessel,' which devolved upon the officers of the ship, and the omission to close them was a 'fault or error in the management of the vessel,' within the language of the act. The omission was a fault of precisely the same nature as the omission to put on hatch covers would have been in a rough sea. *By the supply of proper ports, proper glasses and proper iron covers for the ports*, as in the supply of proper hatch covers, *the owner's duty of 'due diligence' was fulfilled;* and if the officers of the ship, either at the moment of sailing or afterwards, omit to make use of the things supplied to put or keep the ship in a proper seaworthy condition for meeting the perils of the seas from time to time, such an omission seems to me purely a fault 'in the navigation or management of the vessel,' for which the owner is not responsible under the recent act."

In the Court of Appeals it was held that the ship was not unseaworthy, because the glass ports were plainly a sufficient protection to the cargo for ordinary weather, and there was ready access to the steerage for the purpose of closing the dummies if neccessary on the approach of a storm, and that the omission to close the dummies, if a fault at all, which was doubted, was a fault in the management of the ship, and hence was within the exemption provided by the statute (35 U. S. App., 395).

The substance of the decision in the Court of Appeals was stated by Wallace, Circuit Judge (Rec., pp. 53, 54), as follows:

"We are of the opinion that the steamship was not unseaworthy when she began her voyage. Granting that the glass covers were not a sufficient protection for the ports in rough weather, they were adequate for fair weather, and it would have been but the work of a few moments to unbatten the hatch of the compartment, and close them with the iron covers. In the state of the weather during the first few hours of the voyage, there was no necessity for closing the ports with the iron covers, none even for closing them with the glass covers, and it can hardly be imagined that a storm would be encountered without premonitions affording ample time for ac-

cess to the compartment, and for fastening the iron covers. The case of Steel *v.* Steamship Co., 3 App. Cas., 72, is quite in point. In that case a cargo of wheat was damaged by sea water entering a port about a foot above the water line, owing to the insufficiency of the fastenings. The special finding of the jury did not state whether the insufficient fastening of the port happened before starting on the voyage or afterwards. The bill of lading contained the usual negligence exemptions, which were sustained in the Court below, where judgment was given for the defendants. On appeal it was held that the judgment must be reversed, and the cause remanded for a specific finding as to whether the port was insufficiently fastened when the steamer sailed, and, if so, whether the cargo was so stowed, with reference to the port, that it could not be readily closed on short notice, on the approach of storm. Lord Blackburn expressd the opinion that if the port was in a place where it would be, in practice, left open from time to time, but was capable of being speedily shut if occasion required, the vessel could not be said to be unfit to encounter the perils of the voyage; that if, when bad weather threatened, it was not shut, that would be negligence of the crew, and not unseaworthiness of the ship.

If the steamship was seaworthy, she was nevertheless liable for the loss, notwithstanding the exception against dangers of the seas in the bill of lading, if those in charge of her navigation were negligent in not causing the port to be sufficiently secured after the steamship got out to sea, unless the Act of Congress relieved her. Whether they were justified in supposing that there could be any reasonable apprehension of risk from a port so small and so high above the water line as this, protected as it was by a glass cover of such thickness, is a question of fact, in respect to which different minds might differ. Assuming, however, that they were not, and that they were negligent in not putting on the iron cover, we think the case is controlled by the Act of Congress, and that its provisions relieve the steamship from liability." * * *

(p. 54): "It has also always been the law that the exemption of the dangers of the seas in the bill of lading or other contract of affreightment does not exonerate the shipowner from responsibility for injury to the goods which results from a breach of his implied obligation to provide a seaworthy vessel. Thus the carrier was responsible for a loss produced by the dangers of the sea if it was one which would not have happened, except for the concurrence of some unknown and undiscoverable defect in the equipment of the vessel, which defect, because

it was not discoverable, could not be remedied. In the place of this responsibility the Act of Congress substitutes a less stringent one by declaring that if the owner shall exercise 'due diligence' to make the vessel in all respects seaworthy, neither he nor the vessel is to be responsible for damages or loss in transporting merchandise, resulting from "faults or errors in her navigation or management," nor for losses arising from dangers of the sea. Other sections of the act emphasize the meaning of the particular section. Sections 1 and 2 prohibit carriers from relieving themselves by contract from the obligation of exercising 'due diligence to make their vessels seaworthy,' or from liability for loss or damage to cargo arising from negligence, fault or failure in proper loading, stowage, custody, care or proper delivery; that it does not prohibit them from displacing by contract the warranty of seaworthiness, or their responsibility as insurers of cargo. Read as a whole, the purpose of the act manifestly is, on the one hand, in the interests of the public, to prevent carriers from evading responsibility to exercise due diligence in providing seaworthy vessels, and in the handling and care of the cargo; and on the other hand, whenever they have exercised due diligence in these respects, to absolve them from liability for losses arising during the transit from the perils of the sea, and from faults or errors in the navigation or management of vessels" (p. 55).

From the final decree of the Court of Appeals, entered pursuant to the foregoing decision, the libelant sued out this writ.

POINTS.

I.

The Evolution of the Harter Act.

The history of the various conferences between the representatives of cargo underwriters, shipowners and ship underwriters, held, for the most part, under the auspices

of the Society for the Reform and Codification of the Law of Nations, at intervals from 1865, to 1887, shows that it was impossible to arrive at a model form of contract of affreightment which continued to be satisfactory to the different interests for any considerable period. A full account of those conferences, and the results, will be found in *Wendt's Maritime Legislation* (3d Ed.), Chap. II., pp. 295–511, dealing with "The International Law of Affreightment in Connection with the Attempts to Agree on Uniformity in the Wording of Bills of Lading." Very little aid in the construction of our statute will be derived from an examination of the different forms of documents agreed upon at the various sessions of the association. Each session was dissatisfied with the proceedings of the former meetings; Congress seems to have been dissatisfied with them all.

Mr. Harter's act, as introduced in the House of Representatives in 1892, was very obviously based upon an act introduced in the House of Representatives at the instance of the New York Chamber of Commerce, and passed by the House February 3, 1885 (Wendt, pp. 403, 404). This bill was passed about six months before the Hamburg Rules, to which the appellant makes reference as the probable origin of the statute (Wendt, pp. 430, 442). There was nothing in the act passed by the House in 1885, nor in the Hamburg Rules, which corresponded with Section 3 of Mr. Harter's act. That section appears to have been original with him or with the cargo underwriters for whom he acted,

The second section, which he took from the third section of the proposed act of 1885, was modified by him so as to be more stringent, by changing the provision defining the shipowner's obligation with regard to seaworthiness, as a duty "*in every way and manner within their, his or her power* to render said vessel seaworthy and capable of performing her intended voyage," and substituting for it an obligation to make said vessel seaworthy, &c. A warranty was substituted for diligence.

These changes are shown in the subjoined parallel:

PROPOSED ACT OF 1885.

SECTION 3. That it shall not be lawful for any such vessel, her owners, master, agent or manager, to insert in any bill of lading any clause, covenant, or agreement whereby the obligations of the owners of said vessel to properly equip, man, provision, and outfit such vessel, and in every way and manner within their, his, or her power to render said vessel seaworthy and capable of performing her intended voyage, shall in any wise be lessened, weakened, or avoided; and all provisions and clauses contained in any bill of lading issued by any such public carrier relieving from liability the vessel, her owners, or master for their or his neglect, or for any improper condition of the vessel, shall be null and void and of no effect in law.

HARTER'S HOUSE BILL.

SEC. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel to properly equip, man, provision, and outfit said vessel, and make said vessel seaworthy and capable of performing her intended voyage, or any covenant or agreement whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened or avoided.

In the Senate, Mr. Harter's proposed second section was changed by the introduction of a clause making the definition of the obligation in regard to seaworthiness read that the owner was "*to exercise due diligence*" to make the ship seaworthy.

The Senate's changes in this section, which were concurred in by the House, are shown below:

HOUSE BILL.

SEC. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading, or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel *to* properly equip, man, provision, and outfit said vessel, and make said vessel seaworthy, and capable of performing her intended voyage, or *any covenant or agreement* whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened or avoided.

AS AMENDED.

SEC. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent or manager to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel *to exercise due diligence* [to] properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened or avoided.

The third section of Mr. Harter's act, which finds no counterpart in any of the model documents referred to by Dr. Wendt, and the changes in it that were made by Senate amendments, finally concurred in by the House, are shown below:

HOUSE BILL.

SEC. 3. That if any vessel transporting merchandise or property *between* ports of the United States of America *and foreign ports* shall, *on starting on her voyage*, be in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent *or master* shall become or be held responsible for damage or loss resulting from *error of judgment* in navigation or in the management of said vessel. *if navigated with ordinary skill and care, from the time of her leaving her usual place of loading on her intended voyage until her arrival at the usual place of discharge at her port of delivery*, nor shall the owner or owners, *the vessel*, or master be held liable for losses arising from dangers of the sea, acts of God, or public enemies, *or in saving life, and it may be stipulated in bills of lading and shipping receipts that the vessel may render services to property in distress afloat and tow same to the nearest and most convenient port of safety without incurring penalties from deviation in rendering such service.*

AS AMENDED.

SEC. 3. That if *the owner* of any vessel transporting merchandise or property *to or from any port* in the United States of America shall *exercise due diligence to make the said vessel* in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or *charterers* shall become or be held responsible for damage or loss resulting from *faults or errors* in navigation or in the management of said vessel nor shall the *vessel*, her owner or owners, charterers, *agent*, or master be held liable for losses arising from dangers of the sea *or other navigable waters*, acts of God, or public enemies, *or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service.*

Whatever Mr. Harter's object may have been in introducing the bill, it is plain from an examination of its course through Congress, and of the changes made in it before its final passage, that it embodies a compromise between the different commercial interests, represented on one side by cargo and its underwriters, and on the other, by the ship and its underwriters.

In view of this fact not much light is thrown upon it by reference to the "evil to be remedied," except in so far as that evil is indicated by the phraseology of the different sections. From this it appears there were evils on both sides. Speaking generally, the language of the statute

shows that the cargo interests desired to prevent exemptions from improper stowage, care and custody of the cargoes at ports of shipment and ports of delivery, and in the matter of delivery at the port of destination. The vessel interests desired relief especially from liabilities from latent defects (The Glenfruin, 10 P. D., 103), and from faults or errors in navigation or in the management of the ship and her appliances, where the owner personally had exercised due diligence in providing a structurally fit and adequate ship for the service. The Harter Act represents a compromise reached on substantially those lines.

The act as introduced by Mr. Harter, and as finally passed, will be found in the appendix (pp. 49, 50, 51).

There seems to be no serious question that the third section of the statute, at least, applies to vessels transporting merchandise to ports in the United States from foreign ports. That section provides:

"That if the owner of any vessel transporting merchandise or property *to or from* any port in the United States shall exercise due diligence, &c., neither the vessel, her owner or owners, agent or charterer shall become or be held responsible for damage or loss resulting from faults or errors in navigation, or in the management of said vessel," &c.

It has been decided in a number of the lower courts, in analogy to the decisions under prior acts relating to navigation, that the exemptions provided by the third section are available to foreign vessels (*The Elona*, 64 Fed., 880, 882; 38 U. S. App., 50; *The Silvia*, 35 U. S. App., 395; *The Strathairly*, 124 U. S., 555; *The Scotland*, 105 U. S., 24, 30; *The State of Virginia*, 60 Fed., 1018; *Thomassen* v. *Whitwell*, 12 Fed., 891; *In re Leonard*, 14 Fed., 53; *Levinson* v. *Oceanic Steam Nav. Co.*, 15 *Fed. Cas.*, 442).

II.

The ship was seaworthy on sailing from Matanzas, with the glass port closed and secured, though the dummy or deadlight inside was not shut. There was ready access to the steerage, so that the dummy could be closed, if necessary, at a moment's notice on the approach of storm.

(**a**.) The ship was structurally fit in all respects. Her master testified:

"She is built of iron; classed in Lloyd's 100 A 1—a first-class ship in every respect (p. 5).

"Q. In what sort of general navigable condition was this vessel maintained by the owners? A. First class.

Q. Was she wanting in any respect, so far as you know? A. No, sir."

Libelant produced no evidence, nor does the record suggest that the vessel was not properly equipped or lacking in any needful appliances.

(**b**.) She was supplied with the usual kind of ports, which were sound, fit and sufficient when used. No question arises, except with regard to a single port in the steerage.

The port that broke was the forward one of a row of four or five on the starboard side of the ship in the No. 1 between-decks, which was fitted as a steerage. It was about thirty feet from the bow, where the side of the ship was straight, and about eleven feet from the water line. It was an eight inch port. The glass, five-eighths of an inch thick, was put in the brass frame from the outside, and held in the frame by a brass rim that screwed in. The frame and the glass were in perfect condition. It was supplied with the usual blind or dummy, which was also in order, and when closed made the hole water-tight, even without the glass port (pp. 9, 28, 36).

It seems that this port had been cut in the ship's side and fitted about three months before this voyage (Nichol-

son, p. 30). After it was fitted, the vessel made the following voyages: (1) from London to St. Johns, under command of Captain Nicholson (p. 30); (2) from St. Johns, where Captain Clark took command of her, to Pilley's Island; (3) from Pilley's Island around to St. Johns; (4) from St. Johns to Halifax; (5) from Halifax to New York; (6) from New York to Philadelphia; (7) from Philadelphia to Tucacas, Venezuela (p. 20); (8) from Tucacas to Puerto Cabello; (9) from Puerto Cabello to Matanzas, where she loaded libelant's cargo (p. 19).

The metallic fittings of the port and the glass were sound and in all respects fit (p. 34). There was no injury or damage to the metallic part of the port in the accident that broke the glass. The carpenter, Shotell, testified (p. 36):

"Describe the appearance of the port when you went in the steerage after it was broken? A. The rim was fast, the port was secured, and there was simply a few fragments of glass in the frame."

(P. 38): "Q. Was the frame injured in any way, the frame of the port? A. No, sir; the frame was perfectly tight.

"Q. Was it screwed up? A. Yes, the same as it had been."

(**c**.) The glass port was closed and secured in the usual way before sailing on the voyage.

The ship sailed from Matanzas on the morning of February 16th. On the previous afternoon the captain directed the chief officer to see that the ports in the steerage were closed and secured (pp. 12, 13). The mate testifies that he received those orders (pp. 23, 24) and instructed the carpenter accordingly (pp. 24, 31). The carpenter admits having received the instructions (pp. 35, 37). He accordingly went into the steerage and closed and secured all the ports with his own hands (pp. 35, 38). He testifies positively that the port which afterwards broke was properly closed and screwed up (p. 35). The mate went down into the steerage after the carpenter had finished, examined the ports himself, and found them all closed and fastened (p. 24). The captain on returning to the ship from the shore, late in the afternoon, rowed around the ship in his

boat. He also testified positively the ports in the steerage were closed and appeared to be fastened (p. 6).

(**d**.) The dummies were designedly left open on sailing to afford light in the steerage. It was expected the officers and crew would be going in there for ship's purposes during the voyage.

It had not been usual to close the dummies in the steerage during any of the time that the witnesses who were examined had been with the ship, a period of at least three years (pp. 8, 23, 33), though no passengers had been carried there (p. 33). In the judgment of the officers the glass ports were sufficient to keep out the water, and the iron covers had been left open apparently to afford light for the compartment. The mate was asked about this on cross-examination:

"By Mr. Burlingham: Q. Now, you did not need any light in the steerage on that vessel, did you? A. We had to have light going down about our stores" (p. 29).

Some of the ship's lines, stores, oils, lights (p. 14), spare gearing (p. 22), sails (p. 39) and hauling lines (p. 21) were in this compartment; and it was evidently expected that persons would be going into the steerage from time to time. This was testified by the captain in his cross-examination (p. 14):

"Q. Was there anything the matter with the dummy on the inside of that port light? A. Not that I am aware of.

Q. Could it have been shut when you left Matanzas just as well as after you discovered it? A. Yes.

Q. No particular reason for leaving it open? A. Yes. *We wanted to go down there at any time for* stores, oils, lights, and so on."

The evidence of the mate, to which the libelant refers (Brief, p. 8), is not in contradiction of the foregoing testimony, that it was expected persons would be going in and out of the steerage during the voyage, but merely shows that the spare gear they had there was not such as would probably be required in the course of an ordinary voyage.

It does not show that the stores, oils, or lights (p. 14) would not be required.

(**e**.) There was free and ready access to the steerage at all times during the voyage.

All that was required was merely to unbatten one corner of the hatch, the work of a few moments.

The appellant argues (Brief, p. 7) that the Court of Appeals was wrong in finding to this effect, intimating that battening down the hatches is a complicated matter, which the Court of Appeals, from its supposed want of experience in admiralty cases, did not properly appreciate. But this was not left to inference.

Libelant's counsel himself proved, on the cross-examination of the ship's officers, what battening down means, and that, when battened down, the hatch could be opened so as to provide access to the steerage in two minutes.

On the subject of battening down, Captain Clark testified (p. 21):

"By Mr. Burlingham: Q. What do you mean by battening down? A. In battening down, we put tarpaulins on the hatch, put the battens in and drive the wedges in; that is the way a hatch is battened down in all cases."

Touching the question of ready access to the steerage, the master testified (p. 14):

By Mr. Burlingham: "Q. You had cargo in this so-called steerage? A. No.

Q. Nothing in it? A. No.

Q. What is it for? A. Steerage passengers.

Q. What was it used for on this occasion? A. We had some lines, a little stores and one thing and another there.

Q. *Do you mean that there was perfectly easy access to that steerage at all times during this voyage?* A. *Yes.*

Q. Nothing to prevent a man from seeing whether anything had happened to those ports by going down there into the steerage? A. Nothing in the world to hinder him from seeing all around. * * *

Q. No particular reason for leaving it open, was there? A. Yes. We wanted to go down there at any time for stores, oils, lights and so on."

Chief officer Nicholson testified to the same effect (p. 30):

By Mr. Burlingham: "Q. *How long does it take you to get it open and go down?* Two minutes? A. *A couple of minutes, I suppose. Perhaps do it in less in extra pressure. Only a matter of knocking three or four wedges out.*"

(f.) On the facts of the case the ship was seaworthy at the time of sailing.

The finding of the Court of Appeals was as follows (p. 53):

"We are of the opinion that the steamship was not unseaworthy when she began her voyage. Granting that the glass covers were not a sufficient protection for the ports in rough weather, they were adequate for fair weather, and it would have been but the work of a few moments to unbatten the hatch of the compartment and close them with the iron covers. In the state of the weather during the first few hours of the voyage there was no necessity for closing the ports with the iron covers, none even for closing them with the glass covers; and it can hardly be imagined that a storm would be encountered without premonitions affording ample time for access to the compartment and for fastening the iron covers."

The facts fully establish the correctness of these conclusions. The Court rightly determined from them that the ship was not unseaworthy on sailing (The *Titania*, 19 Fed., 101, 107; *Steele* v. *The State Line*, 3 App. Cas, 72, 82, 90; *Hedley* v. *Pinkney & Sons S. S. Co.*, 1894 App. Cas., 222, 226-8; *Gilroy* v. *Price*, 1893 App, 56, 64; The *Mexican Prince*, 82 Fed., 484.

Steele v. *State Line*, 3 App. Cas., 72, was the case of a cargo of wheat, shipped at New York for Glasgow, and damaged by sea water entering through a cargo port, *about a foot* above the water line, which was insufficiently fastened. The special finding of the jury did not state whether the insufficient fastening of the port happened before starting on the voyage or afterwards. The bill of lading contained the usual negligence exemptions, which were sustained in the Court below, where judgment was given for the defendants. On appeal the judgment was reversed, and the cause remanded for a specific finding as

to whether the port was insufficiently fastened when the steamer sailed, and, if so, whether the cargo was so stowed with reference to the port, that it could or could not be readily closed on short notice, on the approach of storm. Lord Cairns, *L. C.* (p. 82), said:

"On the occasion of that new trial it appears to me that it will be the duty of the learned Judge who conducts it to obtain from the jury an expression of opinion as to whether the ship, at the time she left New York, was seaworthy in the sense in which I have used the term; of course in arriving at that conclusion the precise and accurate consideration of the state of this port will become very material. *It may * * * be that the port, if open when she left New York, was not occasioning any danger to the ship whatever, so long as calm or moderate weather prevailed*, and *it may be that the port was so circumstanced that, upon any approaching change of weather, it might immediately have been closed and fastened down;* or it may be, on the other hand, that the cargo was so loaded that, the fastenings of the port being from the inside, those fastenings were covered over by the cargo, and rendered inaccessible, or rendered, at any event, inaccessible without such a removal or change of the cargo as would occupy a considerable time, and could not conveniently take place when the ship was at sea."

On this point Lord Blackburn (p. 90) said:

"Now, my lords, I cannot see that this special verdict finds, either one way or the other, whether or no there was a want of seaworthiness or reasonable fitness to encounter the ordinary perils of the voyage or not. I think that is left quite ambiguous and uncertain. I quite agree with what has been said, that it was a question of fact for the jury, whether or no the vessel was made reasonably fit to encounter these ordinary perils.

I think also that there are some views of the case in which, though it would still be a question of fact for the jury, there could not be much doubt about it one way or the other. If, for example, this port was left unfastened, so that when any ordinary weather came on, and the sea washed as high as the port, it would be sure to give way and the water come in, unless something more was done —if in the inside the wheat had been piled up so high against and covered it, so that none would ever see whether it had been left so or not, and so that if it had been found or thought of, it would have required a great

deal of time and trouble (time above all) to remove the cargo to get at it and fasten it—if that was found to be the case, and it was found that at the time of sailing it was in that state, I can hardly imagine any jury finding anything else than that a ship which sailed in that state did not sail in a fit state to encounter such perils of the sea as are reasonably to be expected in crossing the Atlantic. *I think, on the other hand, if this port had been*, as a port in the cabin or some other place would be, open, and when they were sailing out under the lee of the shore remaining open, but *quite capable of being shut at a moment's notice, as soon as the sea became in the least degree rough, and in case a regular storm came on, capable of being closed with a dead light—in such a case as that no one could, with any prospect of success, ask any reasonable people, whether they were jury or judges, to say that that made the vessel unfit to encounter the perils of the voyage*, because that thing could be set right in a few minutes, and there is always some warning before a storm comes on, so that they would have plenty of time to put it all right, and it would have been put right. *If they did not put it right after such a warning, that would be negligence on the part of the crew and not unseaworthiness of the ship.*"

In *Hedley* v. *Pinkney & Sons S. S. Co., Ltd.* [1894], App. Cas., a ship was sent to sea with stanchions and rails on board, but not shipped as they ought to have been, so as to raise the bulwarks at a certain part the proper height. A storm came on, and a seaman engaged in performing his duty on deck fell overboard, in consequence of the neglect to ship the stanchions and rails, and was drowned. The Court found it was not safe for the crew that the ship should leave port with the stanchions and rails unshipped. The plaintiff claimed the defendant was liable for a breach of its duty, under the Merchant Shipping Act, 1876, S. 5, which provides:

"In any contract of service, expressed or implied, between an owner of a ship and the master, or any seaman thereof, there shall be implied, notwithstanding any agreement to the contrary, an obligation on the owner of the ship, that the owner of the ship, and the master shall use all reasonable means to ensure seaworthiness of the ship for the voyage at the time when the voyage commences, and to keep her

in a seaworthy condition for the voyage during the same" (39 & 40 Vict., C. 40, S. 5).

The House of Lords held that the neglect of duty on the part of the master did not render the ship unseaworthy, within the meaning of the act. Lord Herschell, *L. C.* (whose judgment was concurred in by Lord Watson and Lord Macnaghten (pp. 226-8) said:

"The question is, Was there evidence that this obligation had not been fulfilled? It is asserted on the part of the appellant that there was, on the ground that the apertures, which should have been closed by fixing the stanchions and rails, were left unclosed; that the vessel was consequently, at the time of the accident, unseaworthy; and that the master, having failed to see that the stanchions and rails were fixed, had not used all reasonable means to keep 'her seaworthy for the voyage during the same.'

"My Lords, the case mainly turns, in my opinion, on the construction to be put upon the words 'seaworthy for the voyage' in the connection in which they are found.

"The word 'seaworthy' is a well-known term in shipping law, and has a perfectly definite and ascertained meaning. It is used to describe the condition in which a vessel insured under a voyage policy is bound to be on leaving port if the contract of insurance is to be effectual against the underwriter.

"Baron Parke, in the case of *Dixon* v. *Sadler* (5 M. & W., 405, 414), defined the seaworth ness of a vessel thus: 'that she shall be in a fit state as to repairs, equipment, and crew, and in all other respects to encounter ordinary perils of the voyage.' Other definitions which have been given do not, I think, substantially differ from this, and I think when so well known a word is used in the statute of 1876, it must have its well established meaning attached to it.

"The question is then, was the vessel unseaworthy in this sense at the time of the accident? It must be admitted that there was more danger to those engaged on board than if the moveable bulwark had been in its place; but did this render the vessel unseaworthy?

"In the case of *Steele* v. *State Line Steamship Company* (3 App. Cas., 72), which came before your Lordships' House, the question arose whether a vessel which started on her voyage with an insufficiently fastened porthole, through which the sea burst, damaging the cargo, was in a seaworthy condition at the commencement of her

voyage. Lord Blackburn expressed the opinion that if the port was in a place where it would be in practice left open from time to time, but was capable of being speedily shut if occasion required, the vessel could not be said to be unfit to encounter the perils of the voyage; that if when bad weather threatened it was not shut, that would be negligence of the crew and not unseaworthiness of the ship.

"My Lords, I entirely concur in this view. It is quite clear that if this view be correct, the *Prodano* was not unseaworthy at the time she left the port of London. After she left that port, her hull and equipment remained precisely what they were at the time of her departure. She was in all respects efficiently equipped. The fault was in not making use of the equipment with which she had been furnished.

"Under circumstances such as these, I do not think it can be said that there has been a failure to keep her in a seaworthy condition for the voyage within the meaning of the enactment. Following, as it does, the obligation that the owner and the master, and every agent charged with the loading of the ship or the preparing thereof for sea, shall use all reasonable means to insure the seaworthiness of the ship for the voyage, I think the words 'to keep her in a seaworthy condition for the voyage during the same' point to an obligation of the same character, and not to a neglect properly to use the appliances on board a vessel well equipped and furnished. There is ample scope for the operation of the words in question, even though this construction be put upon the enactment. If any of the necessary appliances were lost or destroyed in the course of the voyage, it would, no doubt, be the duty of the master to use all reasonable means to supply others in their place, just as it might be his duty during the voyage to restore the hull or machinery, if damaged, to a condition suited to the perils to be encountered. But if the appellant's argument were to prevail, it would have a much wider scope than I am able to gather from the words of the enactment was intended by the Legislature.

"The failure properly to secure many parts of the ship which are in ordinary practice open, from time to time, would no doubt diminish the safety of those serving on board her, and be a source of danger to them; *but I do not think it could reasonably be said that because in such a case a bolt was not securely fixed, the vessel thereupon became unseaworthy.*"

In *Hedley* v. *Pinkney & Sons*, 1892, 1 Q. B., 56, 65, Lord Esher had said (p. 65):

"It seems to me that these words of Lord Blackburn (the passage above quoted from the decision of Steel *v.* State Line), give an exact criterion whether the ship was seaworthy in the present case. The complaint must be that the ship was not properly equipped at the time of the accident, but the movable railing, which went on the top of the bulwark, was there, and was capable of being shipped; it was not denied that if it had been put in its place it was a sufficient security for the crew against ordinary risks of going overboard. It is exactly like the case described by Lord Blackburn, of the porthole left open, but which could be easily shut at any moment. The ship was in such a state, and so equipped, that, if the captain had done what it was his duty to do, when he saw a storm coming up, she could have been made safe in a moment. Under these circumstances, according to the illustration given by Lord Blackburn, the case is one of negligence on the part of the captain, not of unseaworthiness on the part of the ship. Therefore, in the ordinary sense of the term, this vessel was seaworthy."

A case somewhat resembling *Hedley* v. *Pinckney S. S. Co.* (*supra*) is that of *Quebec Steamship Co.* v. *Merchant*, 133 U. S., 375 where this Court reached a similar conclusion.

The appellant contends (*Brief*, p. 12) that this case is not in point because it deals with the liability of master to servant, whilst "the present case turns on the liability of a carrier to cargo, an entirely different relation." But, although the subject matter of the cases is different, the legal principle is identical in both.

The statute before the House of Lords in the English case provided that "all reasonable means to insure the seaworthiness of the ship for the voyage" should be adopted, while under the Harter Act, the obligation of the owner is "to exercise due diligence to make the ship seaworthy." The cases are therefore alike in two particulars: (1) at to what constitutes "due diligence" to make a ship seaworthy, and (2) what constitutes seaworthiness as a fact.

In *Gilroy* v. *Price*, 1893 A. C., cited by the appellant, the House of Lords decided merely that an exception from liability for any act, neglect or default whatsover of the master or crew, in the navigation of the ship "in the ordinary course of the voyage," did not relieve the ship from the state of unseaworthiness arising from the omission to case one of her water pipes which, without a case, was liable to be, and in fact was broken by pressure of cargo during the voyage.

In the course of his judgment, Lord Herschell, *L. C.*, observed (p. 64):

"I can understand cases in which a defect which constitutes unseaworthiness at the time of the disaster may have existed at the time when the vessel started, and yet it may have been a case not, properly speaking, of initial unseaworthiness, but of neglect or default in the prosecution of the voyage. If, for example, some porthole be left open, or there be some means of access for the water, which in the ordinary course of the prosecution of the voyage, if the master and crew were not negligent, would be put right, and it is usual to leave open when starting, there is no doubt that, although it existed at the time when the voyage commenced, it would properly be said not to be a case of unseaworthiness, but of 'neglect or default' on the part of the master or crew."

In the *Mexican Prince*, 82 Fed., 482, it was contended that a valve in a branch pipe line leading into one of the cargo compartments, was blocked open at the time of sailing by an obstruction, so that in the ordinary course of emptying one of the tanks during the voyage, water would flow into the hold through the open valve and cause damage to cargo. Brown, *J.* (p. 488), held:

"But even if the alleged obstruction of No. 3 valve existed in leaving Rio, that would not constitute unseaworthiness, for, however it arose, the obstruction, if any, was accidental, of the most temporary character, and sure to be removed by suction upon the first test made with the pumps, and as well as the exercise of reasonable diligence on any special occasion calling for care during the voyage. * * * The cause of the damage, therefore, was negligence in the use of the means of safety provided by the owners, and a neglect to observe their written orders in

that regard, and not any omission by the owners to provide for all the requirements of a seaworthy ship and put her in seaworthy condition. In other words, the fault arose wholly in the management of the ship at the port of call and subsequent thereto; it arose during the voyage, and not from anything the owners did or omitted to do, or any lack of diligence by them to make the ship seaworthy at the commencement of the voyage. The third section of the Harter Act, therefore, exempts them from liability, so far as respects this negligence."

The only case cited by the appellant as opposed to the principles announced in the foregoing decisions is *Dobell* v. *Rossmore S. S. Co.*, 1895, 2 Q. B., 408. In that case the terms of the Harter Act had been incorporated in the bill of lading. Cargo was damaged during the voyage by sea water entering through a *cargo port*, which had been insecurely fastened, and was blocked in by cargo, so that it was inaccessible, and could not be secured during the voyage. The Court expressly declined to consider the Harter Act as a statute, but construed the third section merely as a printed exception in a bill of lading.

Lord Esher (at p. 413) said:

"They then introduced into their bill of lading the words of the Harter Act, *which I decline to consider as an act*, but which we must construe simply as words occurring in this bill of lading."

The Court then proceeded to decide that the insecure closing of a port prior to stowing cargo up against it, was not a fault in the management of the ship within an exception to that effect in the bill of lading. This is the gist of the decision.

Lord Esher quoted with approval (p. 415) the doctrine announced by Lord Blackburn, in *Steel* v. *State Line* (*supra*), "that if there was a porthole in a ship left unfastened and the cargo was stowed in such a way that it would take a considerable time to get at the porthole and fasten it, the ship would be unseaworthy; but that if it could be shut directly the necessity arose, the ship could not be said to be unseaworthy."

The Court of Appeals decision in *The Silvia*, was distinguished by counsel in the *Rossmore* case (p. 412), who said:

"The case in the United States Circuit Court of Appeals followed the decision in Steel *v.* State Line Co., and it is plain the port could have been got at and closed with the iron shutter, directly the necessity arose."

And Lord Esher, who had the decision of the Court of Appeals before him, evidently did not consider that the case was one of unseaworthiness, for he said (p. 414):

"In this view of the case, neither Carmichael *v.* Liverpool Co. (19 Q. B. D., 242), nor the decision in the case cited from the United States Circuit Court of Appeals have any bearing on the matter."

If *Dobell* v. *Rossmore Co.* be deemed good law, it is not in point for the appellant, nor in conflict with the preceding cases. The essential difference was that the cargo port was inaccessible, could not be secured during the voyage, and hence the insecurity amounted to unseaworthiness on sailing. In the other cases, and in this case, there was no real insecurity on sailing, and there was opportunity to take further precautions for safety during the voyage whenever the threatened approach of storm made it advisable to do so. The failure to take those precautions —a fault in the management of the ship's appliances—was therefore the proximate cause of the damage, and not unseaworthiness.

III.

That the loss was within the exception of "dangers of the sea" contained in the bill of lading.

(**1**.) It was a sea peril loss.

The damage was caused by sea water, which entered the steerage through the broken port and drained through the wooden bulkhead into No. 2 between-decks and down on the cargo in lower No. 2 hold. The port was in a sound and safe condition when the ship sailed, and was properly secured (pp. 24, 35, 36, 88). It was broken whilst the vessel was at sea during rough weather (pp. 9, 15, 19, 20, 24). A loss happening under these circumstances is *prima facie* a loss by a danger of the sea (The *G. R. Booth*, 64 Fed., 878, 879; *Hibernia Ins. Co.* v. *St. Louis Transp. Co.*, 120 U. S., 166; *Carruthers* v. *Sydebotham*, 4 M. & S., 77; *Laurie* v. *Douglass*, 15 M. & W., 745; *Davidson* v. *Bernaud*, L. R., 4 C. P., 117; The *Southgate* [1893], Prob., p. 29; The *Xantho*, 12 App. Cas., 503, 508, 513; *Hamilton* v. *Pandorf*, 12 App. Cas., 518, 522-5).

In *Hamilton* v. *Pandorf*, 12 App. Cas., 518, 525, where sea water was let into a ship by a hole which rats had gnawed in a lead pipe, causing damage to cargo, it was claimed that the loss was not within an exception of "dangers and accidents of the sea." Lord Watson (at p. 525) *put the case of water entering an insecurely fastened port as an illustration of such a loss.* He said:

"If the respondents were preferring a claim under a contract of marine insurance, expressed in ordinary terms, I should be clearly of opinion that they were entitled to recover, on the ground that their loss was occasioned by a peril of the sea within the meaning of the contract. When a cargo of rice is directly injured by rats, or by the crew of the vessel, the sea has no share in producing the damage, which, in that case, is wholly due to a risk not peculiar to the sea, but incidental to the keeping of that class of goods, whether on shore or on board of a voyaging ship. But in the case where rats make a hole, *or where one of the crew leaves a porthole open*, through which the sea

enters and injures the cargo, the sea is the immediate cause of mischief, and it would afford no answer to the claim of the insured to say that, had ordinary precaution been taken to keep down vermin, or had careful hands been employed, the sea would not have been admitted and there would have been no consequent damage.

"Your Lordships have now disapproved of the novel doctrine that, in a contract of sea carriage, a meaning must be attached to the expression 'dangers and accidents of the sea' different from that which it bears in a contract insuring cargo against sea risk; that, in a case of a charter-party or bill of lading, the Court ought to look to what has bean termed the remote, as distinguished from the proximate, cause of damage, whereas, in the case of a policy, the proximate case can alone be regarded. The expression has precisely the same significance in both cases; but there is this difference between them, that when a shipowner, who is bound by the implied terms of his contract to carry with ordinary care, claims the benefit of the exception, the Court will, if necessary, go behind the proximate cause of damage for the purpose of ascertaining whether that cause was brought into operation by the negligent act or default of the shipowner or of those for whom he is responsible."

In the same case (p. 513) Lord Bramwell said:

"It would be strange if an underwriter on cargo, suing in the name of the cargo owners on the bill of lading, should say: 'I have paid for a loss by perils of the sea, and claim on you because the loss was not by a peril of the sea.'"

Appellant contends that the loss should not be regarded as by a danger of the sea, because the weather was not "extraordinary." Plainly, it was a gale; whether it was "extraordinary" or not depends largely on the mental habits or modes of expression of the witness. Seamen will always *understate* the severity of a storm. It is doubtful, however, whether the distinction between ordinary and extraordinary gales is important (The *Centurion*, 68 Fed., 382, 385, 386). The Court there said:

"This storm appears, both from the account given at the time, before the extent of damage to the cargo was known, and from the effect upon the vessel itself, to have been sufficiently severe and violent to create the injury to

cargo, although sufficiently chocked and fastened to resist storms which might reasonably be anticipated,"

and hence found the loss was by a peril of the sea.

Here appellant argues that the glass broke in a moderate gale, and that, therefore, the loss was not by a danger of the sea.

But this argument will work both ways. It may be said that the port was sufficiently strong to resist all ordinary seas, and that the fact that it broke proves that something extraordinary occurred.

The vessel had traded for at least three years (p. 36), with the line of ports on the same level, extending from stem to stem (p. 6), and none, as far as appears, had ever before been broken (pp. 36, 25, 9, 21, 22). In practice, the dead lights had never been closed, except in the cargo compartments, where the the glass was liable to injury, either from the inside or from being damaged by lighters, and experience had shown that the glasses in the ports that far above the water line were strong enough to withstand the pressure of the heaviest seas (pp. 7, 8, 22, 23, 25, 36). Neither the captain, a master mariner of fourteen years' experience (p. 5), nor the chief officer, who also held a master's certificate and had been in command (p. 30), ever heard of ports similarly situated being stove in by the sea (pp. 21, 22, 23). In the judgment of the officers the sea had not broken this port, but a floating bit of wreckage (pp. 25, 9). This judgment was confirmed by the fact that at the time the steamer was in the worst of the storm, was heading directly into it (p. 9); the blinds on the forecastle ports, at the same level, and situated on the bluff of the bow, where the heaviest blows would be received from the seas breaking against and over the bows, were not closed, yet none of the glasses was broken.

If any inference is to be derived from these facts, it is that a blow was received on the side port by something floating on the surface of the waves, and that the loss was from one of the unknown perils peculiar to the sea.

If the port, always theretofore unprotected by the blind, had withstood more severe storms, the in-

ference would be that something besides water broke it on this occasion. Whilst, if the storm was more severe than any it had previously withstood, the extraordinary severity should be considered a peril within the exception (The *Exe*, 14 U. S. App., 626).

(2.) The libelant failed to prove such negligence on the part of the officers as would deprive the ship of the benefit of the exception.

The loss being *prima facie* by a danger of the sea, and hence within the exception the burden of proof was upon the libelant to defeat its operation (The *Hindoustan*, 35 U. S., App., 173; *Clark* v. *Barnwell*, 12 How., 272, 280; *The Victory and the Plymothian*, 168 U. S., 410, 423; *Transportation Co.* v. *Downer*, 11 Wall., 129; *Railroad Co.* v. *Reeves*, 10 Wall., 176, 189, 190).

The proof offered by the claimant showed that in spaces other than cargo compartments, at this level of the water, it was not usual or customary to close the deadlights; and in their long prior experience no accident had befallen the glasses. The ports in the steerage on this voyage had been managed in the usual and customary way. The only witness libelant called on the subject was one of the admiralty surveyors of Philadelphia, a former shipmaster, who was asked this single question: "Q. Do you know anything about the custom of shutting those dummies at sea? A. Yes, sir. They are always shut *in the cargo space*" (p. 43). They were shut in the *cargo* spaces on this voyage. But the question was as to the custom relating to those in *non*-cargo spaces. As to those, the libelant's expert did not contradict the testimony furnished by the claimant.

Libelant furnishes no evidence, but relies wholly on the event as proof of neglience. True the dummy was there and if used would have prevented damage. But the real question is, was the master as a careful officer reasonably bound, under the circumstances, to use it?

"Where the master of the ship takes all such precautions as a man of ordinary prudence and skill, exercising reasonable foresight, would use to avert danger, his own-

ers are not held responsible, because he may have omitted some possible precaution which the event suggests that he might have resorted to" (Montague E. Smith, *J.*, in The *William Lindsay*, 5 P. C., 338, 343; see, also, The *Victory*, 168 U. S., at p. 424).

Judge Brown's finding, that the failure to close the dummies was negligence, was based upon the conclusion that the ports were inaccessible owing to the hatches being battered down (p. 49). This was a subject little discussed in the District Court, and the evidence of ready access to the ports by unbattening a corner of the hatch, a work of two minutes or less (p. 30), was not pressed upon his attention. The Court of Appeals finding as a fact that there was ready access to the steerage and to the ports there, said (p. 54):

"Whether they" [the officers] "were justified in supposing that there could be any reasonable apprehension of risk from a port so small and so high above the water line as this, protected, as it was, by a glass cover of such thickness, is a question of fact in respect to which different minds might differ."

Accepting the proposition that "different minds might differ" as to whether this was negligence, libelant is brought face to face with a difficulty arising from the burden of proof. For, if the loss may as well have occurred by a peril of the sea as by negligence, the libelant cannot recover (*Clark* v. *Barnwell*, 12 How., 272, 280; *Muddle* v. *Stride*, 9 C. & P., 380, 383; the *R. D. Bibber*, 8 U. S. App., 42, 47; *Searles* v. *M. Ry. Co.*, 101 N. Y., 661).

(**3**.) If there was any negligence contributory to the loss, it was a "fault in navigation or in the management of the ship" within the 3d section of the Harter Act.

Prior to the passage of this statute it was held that the carrier could not have the benefit of an exception which *prima facie* covered the loss, where negligence on the part of his servants contributed in any way to the damage. The 3d section of the statute, however, has not only changed the public policy which was behind that rule

adopted by the Court, but has changed the law itself; so that in any case to which the provisions of the Harter Act apply, the fact that a loss may have been contributed to by negligence of the carrier's servants, in connection with the navigation of the ship, or the management of her various appliances, is no longer ground for defeating the exception.

IV.

If the vessel be deemed to have been unseaworthy when she broke ground on the voyage, nevertheless the shipowner "exercised due diligence to make the said vessel in all respects seaworthy and properly manned, equipped and supplied"

(**1**.) The structural fitness of the ship was proved, and is unquestionable.

The evidence leaves no room for doubt that in her general structure the ship was not only *reasonably* fit, but was as perfect as a cargo vessel well could be. The admiralty surveyor of Philadelphia, who was called by the libelant to survey the ship and the cargo, was unable to say a word against the structural sufficiency of the ship. No claim has been made heretofore that she was defective or deficient in any of her appliances. In the appellant's brief (p. 21) there are some *obiter* remarks concerning the proof of diligence by shipowners in other cases; but they are without bearing on the present controversy, since this ship, as a vehicle for carrying cargo, was unquestionably fit in every respect.

(**2**.) The steamer was manned by competent officers and crew.

Captain Clark, who is a master mariner of fourteen years' experience (p. 5), though he had served but a few months in the *Silvia*, had been in five different steamers in his experience (p. 5). The chief officer was also a master mariner and had previously been in command of

this vessel (p. 30). The carpenter, Shotell, the only other witness who had to do with this port, had been going to sea for seventeen years, and had been carpenter of the *Silvia* for three years (pp. 36, 38). A presumption of competency arises under these circumstances (*Butler* v. *Boston Steamship Co.*, 130 U. S., 527, 554; *Pickup* v. *Ins. Co.*, 3 Q. B. D., 594). But no question concerning their general competency arises. Failure to close the ports was at most an error of judgment, which the law may declare amounted to negligence. The ports were left open by design, and the mate, Mr. Nicholson, testified that, if he had had the least suspicion that a glass port was liable to be stove in by the sea, he would "have ordered them to be closed, and have it understood that they were closed" (p. 22).

(**3**.) The steamer was equipped, with proper ports, which, if used, would have made the port watertight against all possible contingencies.

The proof shows that the particular port that broke was supplied with a dead-light, which hung above it, ready to be closed (p. 7), and that after the glass was broken it was closed, and made the hole water tight (p. 18).

(**4**.) Due diligence was, in fact, exercised by those on board the steamer in closing the port.

On the day prior to sailing, the captain ordered the chief officer to see that the ports in the steerage were properly secured (p. 12); and the mate acknowledges receiving that order, and states that he directed the carpenter accordingly (pp. 23, 24). The carpenter admits that the mate told him to close the ports, and says that he went into the steerage, and, with his own hands, closed and fastened them all by *screwing* up the nuts (p. 35). He testifies positively that the one that broke out was properly secured. After he had finished, the mate himself went into the steerage and personally examined all the parts with his hands, finding them properly secured. There can be no doubt that the glass port in question was secured, since the evidence shows that it was the *glass* alone that broke. After the accident the brass rim remained firmly

in its place, properly screwed up, and was uninjured (p. 36).

The officers in charge of the vessel, competent and experienced men, acting under the usual practice, and exercising an honest judgment that the glass port was sufficient, left the dead-light open. Under those circumstances, is it to be said that they did not exercise due diligence in the matter of closing the ports? Due diligence calls merely for ordinary care, for the discharge of their duty in connection with the port in accordance with the practice of reasonably prudent and careful men similarly situated. It does not call for the highest care, although, undoubtedly, that (by closing the blind) would have avoided the damage. The evidence of the ship's witnesses is clearly that of experienced and competent persons. They say they acted in accordance with the usual custom in securing the steerage ports in the way they did; and although the libelant called an expert, apparently with the view of contradicting them, their evidence is in fact uncontradicted. In these circumstances, the finding should be, as we submit, that due diligence was exercised in the manner of closing the steerage port.

V.

The Harter Act exempts shipowners from responsibility for faults in the management of the ship's appliances, the ordinary use and control of which are committed to the officers and crew, even though such mismanagement may occur prior to sailing and may leave the ship unseaworthy.

(**1.**) Whatever may have been the purpose of the other sections of this statute, it is not to be doubted that the third section was designed to effect some limitation upon the pre-existing liability of ships and shipowners. This has been recognized in the Supreme Court, in the *Delaware*, 161 U. S., 459, 471, where Mr. Justice Brown said:

"It is entirely clear, however, that the whole object of the act is to *modify* the relations previously existing between the vessel and her cargo. This is apparent, not only from the title of the Act, but from its general tenor andi provisions, which are evidently designed to fix the relations between the cargo and the vessel, and to prohibt contracts restricting the liability of the vessel and owners in certain particulars connected with the construction, repair and outfit of the vessel, and the care and delivery of the cargo."

The views of the lower courts on this subject have been quoted fully in the preceding statement (*ante*, pp. 4–7).

In the *Colima*, 82 Fed., 665, 678, Brown, *J.*, speaking of the intent of the act to modify the former warranty of seaworthiness, said:

"The context and the pre existing law indicate that the *intent of the act is to relieve the shipowner from his previous warranty of absolute seaworthiness in fact*, and to substitute for that warranty a warranty only of [due] diligence to make the ship seaworthy."

The appellant (*Brief*, p. 11) says this is not so because under the 2d section the owner's obligation as to seaworthiness is still defined in terms of warranty. The argument is based on the omission of the word "to" between the words "diligence" and "properly equip, &c.

This carping criticism of the work of an engrossing clerk cannot change the plain sense of the section. The word "to" was in it as originally introduced (see *Appendix*, p. 49–51); it was in the Statute of 1885, as passed by the House of Representatives on February 3, 1885 (Wendt, Maritime Legislation, 3d Ed., pp. 403, 405), from which this section was taken; it was in the rule proposed by the Hamburg Chamber of Commerce (Wendt Mar. Leg., p. 435), to which libelant alludes as the possible parent of the act; and it was in that rule as modified and adopted by the Association for the Reform and Codification of the Law of Nations (p. 42), at their meeting in Hamburg, August, 1885 (p. 430). It seems evident that the omission of the word "to" was a mere clerical error in transcribing the amendment introduced in the Senate. But even

without the word "to," the section plainly shows that the shipowner's obligation in this respect was merely the exercise of due diligence and not that of warranty.

Now that the warranty of seaworthiness no longer exists, it is not strictly material to inquire whether the ship actually was seaworthy on sailing or not; the real inquiry must be: Was due diligence exercised by the owner to make her seaworthy? The fact that Congress refused to enact a warranty of seaworthiness in the 2d and 3d section, as proposed in Mr. Harter's house bill, tends of itself to show that the division of risks and liabilities made by the statute, was not intended to be marked *by any period of time*—as, *e. g.*, of the sailing of the ship—but rather by the nature of the things to be done to make the ship fit for an ordinary voyage, without causing damage to the cargo.

(**2**.) The object of the statute, as shown by its different sections, was to require due diligence by the owner in *providing* a seaworthy ship for use, and to relieve him from the faults of his servants, to whom her ordinary use is committed.

The first and second sections of the statute indirectly impose a liability upon the shipowners (*a*) for damages which may result from faults in stowage, custody, care or delivery of the cargoes, and (*b*) for liabilities arising from the failure to exercise due diligence to make the ship seaworthy, &c.; for they provide that the introduction of clauses relieving the owner from damage arising from those causes shall be unlawful, and such clauses, if introduced, shall be declared void.

It is noticeable that, in a broad sense, all of those implied duties are such as would ordinarily be performed by a shipowner through forces engaged by him from the shore. The stowage of cargoes would be done by stevedores. The care and custody of the cargo would be left to receiving clerks, wharf clerks, watchmen and other servants of this class, at the port of shipment. The delivery of the cargo would be made by similar servants at the port of destination. Similarly, the work of

making the ship structurally seaworthy, and of manning and outfitting her, would be performed by the owner's shore servants. Over all of these classes of servants, the owner could exercise an immediate supervision, if he so desired. Or he could select such persons of responsibility to perform the services as would be able to respond to him for any liability to which the ship might be subjected through their neglect. These would be fair reasons for allowing the liability for default in such matters to rest upon the shipowner.

The instances in which the District Court has held the shipowner liable for failure to exercise due diligence to make the ship seaworthy (The *Mary L. Peters*, 68 Fed., 919; The *Flamborough*, 69 Fed., 470; The *Alvena*, 74 Fed., 252) were cases where there had been a want of due diligence in providing a structurally fit ship for use by those to whom her use was committed.

But defaults in respect of the matters indicated, are not the sole risks to which goods are liable, in over-sea carriage. A structurally sound and perfect ship may be unfit to start on a voyage, or may at a later stage become unfit to continue it without risk of injuring cargo, owing to the neglect of those to whom the use and operation of the numerous and varied appliances of a modern steamship are necessarily committed. Many of these appliances are provided by an owner, not for a fixed use, but for varied uses. They require manipulation and management. The management may be required before the ship sails, during her passage or after arrival at destination: but in a broad sense, it would be during the voyage in either case (The *Carron Park*, 15 P. D., 203; The *Mexican Prince*, 82 Fed., 484; The *Glenochil* [1896] Prob., 10). At whose risk, under the statute, are losses arising from such faults?

Now that the shipowner is relieved from the warranty of seaworthiness and the warranty of due diligence is substituted in its place, it would seem to be immaterial whether a specific act of mismanagement, which results in damage, occurs before sailing or afterwards, except as it may bear on the extent or scope of the diligence which the statute requires the owner of the vessel to exercise. Does that diligence extend to all matters, even of naviga-

tion and management, until the vessel sails, and does the act exempt the shipowner from faults in management only when they occur afterwards? Is the mismanagement of one of the ship's appliances, just prior to sailing, to be held a default in the exercise of diligence by the owner, and the same act or neglect when occurring on the voyage, to be deemed a fault in management? Or, should the test be to inquire whether the act complained of belongs to navigation or to the management of the vessel (irrespective of the time it occurs), or whether it falls within the class or kind of duties and obligations, exclusive of management, which are to be performed by the owner?

The latter seems to be the true test.

(**3**.) What is included in "faults in *navigation?*"

To *navigate* means "to direct *or manage* a ship" (*Cent. Dict.*).

Faults *in navigation* are not limited to neglect in shaping the ship's course as the appellant contends. In England it has been held that leaving open a sea cock (*Good* v. *London Assn.*, L. R., 6 C. P., 563), or leaving a cargo port insufficiently fastened on sailing (*Carmichael* v. *Liverpool Assn.*, 19 Q. B. D., 242), or omitting to have the rudder fastened with a proper pin, are matters of "*improper navigation*," and improper navigation in the ordinary sense of those words (per Lord ESHER in *Canada* v. *British Assn.*, 23 Q. B. D., 342, 343; The *Xantho*, 12 App. Cas., 503, 513).

It is suggested that some different meaning has been ascribed to the words "*improper navigation*" in the cases above referred to (which arose under policies), than that which they have when found in a bill of lading or in a statute.

The same suggestion was made to the Court of Appeal in England, in *Canada Shipping Co.* v. *British Association*, 23 *Q. B. D.*, 342, but Lord Esher, in answer to it, said (p. 343):

"I do not think that in the case of *Carmichael* v. *Liverpool, &c.*, 19 *Q. B. D.*, 242, the Court held that what happened there was not improper navigation in the ordi-

nary sense of the term, but gave the word *navigation* a meaning other than its *ordinary* meaning. If they had done so I think it would have been a very wrong decision. It appears to me from the paraphrase there given that the word *navigation* accurately expressed the *ordinary meaning of the word.* It was there said that *if there was negligence on the part of the shipowner or his servants before the navigation of the ship commenced*, which had the effect of causing the ship to be unsafely navigated during the navigation with regard to the safety of the goods, that would make the navigation improper navigation. *The ship was only sent to sea in such a condition that she could not be safely navigated with regard to the safety of the cargo, and therefore she was in fact improperly navigated.*"

In the *Warkworth*, 9 *P. D.*, 145, which arose under a statute, 148, Bowen, *L. J.*, said:

"A person who uses his ship which is not in a condidition to be so employed, does in reality improperly *navigate* her."

Under the rule stated in the foregoing cases the failure to use the iron dummy, if a fault at all, would be a "fault in navigation" within the exemption.

(4.) The exemption from faults "in the management of said vessel" is even wider in scope.

Mismanagement of the appurtenances or appliances of the ship *at sea* would be a fault or error in navigation (*Carver, Carriage by Sea*, S. 26, *note* Z).

When, therefore, the statute exempted the ship and her owners, not only from faults or errors of "navigation," but also added "*or* in the *management*" of the vessel, it undoubtedly meant to include acts other than those pertaining to navigation in its strictest sense. Amongst such faults those that most readily occur to the mind relate to such faults in the management of the ship's appurtenances or appliances as would leave her in an unfit state to be navigated with safety to the cargo. It is fair to presume, therefore, that such acts were intended to be covered by the exemption of faults or errors in "management."

That such was the intent of the statute was held in both

the lower courts in the present case (*ante*, pp. 4, 5) and has been decided in others (The *Sandfield*, 74 Fed., 371; The *Mexican Prince*, 82 Fed., 484).

In the *Glenochil*, 1896 Prob., 10, 15, President Jeune in construing this word of the statute, said:

"It is clear that it was intended by S. 3 to exempt from liability for damage or loss resulting from faults and errors of navigation, or in the management of the vessel, and the way in which those two provisions [S. 1 and S. 3] may be reconciled, is, I think, first, that the act prevents exemptions in the case of direct want of care in respect of the cargo, and consequently the exemption permitted is in respect of a fault primarily connected with the navigation or the management of the vessel, and not with the cargo * * * (p. 16). I do not say whether navigation, in the strict sense of the term, is limited to the period during which the vessel is sailing, that is to say, in motion, *but I see no reason for limiting the word 'management' to the period of the vessel being actually at sea.*"

In the same case Gorell Barnes, *J.*, said (p. 19):

"It seems to me that *all exceptions extend from the time that all the cargo was taken on board to the discharge*, though the terms of the exemptions themselves may not cover the particular act. For instance, if the navigation is said to cease at the time of arrival, the word does limit the time, but *there is nothing here to limit the time during which the word 'management' extends*, and it seems to me that it must extend, as the County Court Judge has said, up to the time that the cargo is finally delivered."

This decision overrules, in effect, the *dictum* of Kay, *L. J.*, in *Dobell* v. *Rossmore* (1895), 2 Q. B., 408, that the faults "in the management of the said vessel" referred to by the statute seemed to be "faults in managing *the sailing* of the vessel."

The actual decision in *Dobell* v. *Rossmore*, is irreconcilable with Judge Brown's decision herein (Rec. pp. 49, 50), and with the views in respect of the statute that he has expressed since the *Rossmore* case was published (*Botany Mills* v. *Knott*, 76 Fed., 582, 584).

To construe the word "management" as limited to nautical management, would be to deprive it of sub-

stantially all signification. The language of the statute is carefully chosen to avoid the notion that the word is of such limited application. It relieves the ship and owners from faults or errors in navigation *or* in *the* management. The alternative plainly suggests that acts in the management may be something different from faults in the navigation. Faults in nautical management would be faults in navigation under the first branch of the exemption, and would leave nothing for the word "management" to operate upon.

This argument for a limited construction was pressed upon the Court of Queen's Bench in *Baerselman* v. *Bailey* [1895], 2 Q. B., 301. The exception there was "any act, negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowner in navigating the ship, *or otherwise*." The plaintiffs, owners of cargo damaged by bad stowage, contended that the words "or otherwise" referred to matters akin to navigation. Lord Esher, *M. R.* (p. 303), said:

"The assumed negligence of the stevedore was in disposing of the loading of the cargo before the ship sailed and consequently does not arise under the exceptions relating to negligence in navigation; but the question is whether it comes within the clause under the final words 'or otherwise.' The captain need not have employed a stevedore, though he was entitled to do so; but, under the circumstances, I think it must be taken that the stevedore was a servant of the shipowner. In the exception we do not find words of a class followed by general words. The general words do not indicate something resembling negligence in navigation; but to my mind they indicate something beyond and different to that, so that the clause relates to negligence in navigating the ship, and in matters other than navigating it, and *the question is not one of putting a limitation on the general words, but of reading them in their ordinary sense.*"

Rigby, *L. J.* (p. 305), said:

"Unquestionably, if in a clause in a bill of lading exempting a shipowner from liability there is an ambiguity, the document must be construed in favor of the shipper. That rule has no application where the document is free from ambiguity. We know what the history of these limitations has been. At first

the shipowner was freed from liability for the consequences of the negligence of the master and mariners in navigating the ship. Then the exemption from liability was applied to acts of the other servants, which would include stevedores employed by the captain to stow the cargo, and then the words 'or otherwise' were added to the clause. It seems to me that there is no ground for imputing ambiguity to these words, which must therefore be construed according to their ordinary meaning. The clause exonerates the shipowner from liability for the negligence of his servants, whether in navigating the ship *or not*."

In the *Rotherfield*, 8 R. I. D. M., pp. 102, 104, the Marseilles Tribunal of Commerce, in construing an exception in an English bill of lading which exonerated a shipowner from responsibility for the faults of pilots, officers and crew in the "management or navigation of the ship," defined the word "management" as follows:

"The expression 'management' used by the parties should be interpreted in the sense which is especially attached to it in the language used by the parties in their contract. The tribunal has already had occasion to define the meaning of that expression. In the English language it has not the signification and the general scope which are attributed to it by the defendants. It refers only to the purely technical acts which the master has to perform, in that capacity, for the nautical direction to the ship, for all the manœuvering operations appertaining to her management (conduite) at sea, *in port*, or at anchorage, to the proper stowage of the merchandise for the stability of the ship, and to the ballasting, in a word, to all that concerns nautical art -that is to say, to the navigation, properly so-called, and to keeping the ship afloat (la bonne tenue à flot du navire). *It includes certain accessory operations, which, without being properly called navigation, enter into the precautions to be taken for the benefit* (intérêt) *of the ship, either in loading or discharging the merchandise.* It is to these things that the strict sense of the English word 'management' refers, which, by its origin, and even in its derivation, implies in reality a physical act done for the benefit of the ship (une action materielle appropriée exclusivement au navire). There is no room for doubt as to this, since the clause of the bill of lading applies the word 'management' without distinction to the pilots, officers and crew."

(5.) The "due diligence to make the ship seaworthy" required of the owner, does not extend to acts in the actual management of the ship's internal appliances. For faults in management he is expressly exempted, and the language is not such as necessarily to exclude from the exemption the faults of his servants in management prior to breaking ground for the voyage.

(A.) The context in which the owner's obligation is stated in the third section throws some light on the extent of it. The phrase is "that if the owner * * * shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped and supplied, neither the vessel nor the owner shall be held liable," &c. It is conceded that prior to the statute the owner's obligation with regard to manning and supplying the vessel was merely that of due diligence (*Earnmoor S. S. Co.* v. *Union Ins. Co*, 44 *Fed.*, 374). If he used due diligence in manning the ship he was not liable, though she might go to sea in an unseaworthy condition by reason of being in command of an incompetent or drunken navigator (*Earnmoor* v. *Union Ins. Co.* (*supra*). It was enough to exonerate the owner, that he exercised due diligence in performing the duty of selecting the master.

With the duty of the shipowner to exercise due diligence in manning the ship is linked the duty to exercise due diligence to make her seaworthy. These obligations are now made equal. There is no longer the duty to make her seaworthy in fact, but only to exercise due diligence to make her seaworthy.

That obligation should be taken as subject to the same limitation as the duty in regard to manning her. If he exercises such diligence as results in the provision of a structurally fit and perfect ship, performing all the duties in the matter of her outfit and equipment that would ordinarily be performed by a zealous owner or his shore representative, the obligation resting on him under the statute is fulfilled (*Silvia*, 64 Fed. 607; *Botany Mills* v. *Knott*, 76 Fed , 582, 584). Everybody knows an owner or his superintendent would not, in practice, go aboard a

ship to screw up her ports, or manipulate a valve, or perform any acts in the internal management of the ship's appliances. These are ordinarily committed to the control and management of the ship's officers or engineers. Congress evidently intended to recognize this course of business by limiting the owner's obligation to that of exercising diligence on *his* part in the provision of a structurally fit and proper vehicle for the transportation of cargo, exempting him from faults in the navigation of that vehicle, or in its management, by those to whom, in the ordinary routine of business, the navigation and management are committed, without determining by any point of time, but only by the nature of the acts, the things that are to be considered as navigation or management within the sense of the exemption.

This view is strongly confirmed by a number of negative circumstances.

(**B**.) In determining the intention of Congress it is permissible to regard the provisions which they have struck out of the bill as originally introduced as well as those which they have retained (*One Thousand Bags of Sugar*, 3 U. S. App., 366).

The provisions in the proposed bill that were struck out by amendment before its final passage indicate not only that the Congress did not intend to preserve the warranty of seaworthiness, but also that it did not mean to have the shipowner's obligations and his exemptions marked or determined by the point of time when a vessel should break ground for the voyage.

(**a**.) Both the 2nd and the 3d sections as originally proposed stated the owner's obligation as regards seaworthiness in the terms of warranty (*vid. Appendix*, pp. 49, 50). In the bill as passed the warranty was struck out of both sections, and there was substituted for it the provision that the owner should "exercise due diligence to make the vessel seaworthy."

(**b**.) The 3d section as proposed provided "that if any vessel transporting merchandize," &c., * * * "shall *on starting on her voyage be in all respects seaworthy*," &c., the vessel should be relieved, &c. In that section as passed, the time mark—"*on starting on her voyage*"—was stricken out. The obligation of the owner was measured by the exercise of due diligence to make the vessel seaworthy, in a general sense, *i. e.*, to *provide* a fit ship for use, without attaching to him the responsibilities that formerly followed the failure of the vessel to be, in fact, in all respects seaworthy "on starting on her voyage." It is significant that although the word "voyage" occurred twice in Mr. Harter's proposed third section, it does not appear at all in the third section as finally passed.

(**c**.) In the proposed bill it was provided that the exemptions from loss or damage resulting from error of judgment in navigation or in the management of the vessel should only be allowed if the vessel was "navigated with ordinary skill and care *from the time of her leaving her usual place of loading* on her intended voyage until her arrival," &c.

This qualification was wholly omitted in the section as passed, indicating that Congress intended the exemptions from faults or errors in navigation or in the management to apply, even though they might be committed *before* "the *time of her leaving her usual place of loading* on her intended voyage"; and to have the test relate to the *quality* of the acts, rather than the time when they were committed.

(**C**.) It is argued that faults in management prior to sailing, if serious, constitute a want of due diligence to make the ship seaworthy, and hence are imputable to the owner as a breach of his duty. This, however, is only another form of saying that the exemption from faults in navigation or in management relate only to such as occur during the voyage. It is to be observed in this connection that the owner's duty under the statute falls a good deal short of a warranty. Expressed in an-

other form, the obligation of the shipowner is to use ordinary care; that is, that degree of diligence or care which an ordinarily prudent, experienced and careful owner would exert in respect of his own affairs. A fair way of expressing this obligation would be to say that Congress intended to impose on him the same measure of care in providing a reasonably fit vehicle for the carriage of cargo that he would use in providing, outfitting and equipping an *uninsured* vessel of his own to carry his own uninsured cargo. In such a case it seems obvious that the owner personally or by his shore superintendent would be careful to see that the ship was in every way structurally fit for the voyage and equipped with all needful appliances for her own safety and that of her cargo. He would be careful in the employment of experienced navigators; but to them he would leave, as a practical matter within their more especial knowledge, and as a part of their most ordinary duties, the management of the ship's internal appliances and arrangements and the navigation of the ship. To the officers and crew would obviously be left the management of the pipes, valves, ports and hatches. Unless the Court should be of opinion that an owner under those circumstances would go down into a compartment of a vessel and with his own hands close and screw up the ports, or send a shore representative to do it, instead of leaving that to the officers, it seems impossible to say that the owner of the *Silvia*, by limiting the field of his activities to furnishing a structurally perfect ship, and leaving the management of her ports to her officers, failed, in the exercise of due diligence, to make the ship seaworthy, within the requirements of the 3d section of the statute.

It is suggested in the appellant's brief (p. 22) that the *Silvia* was the first decision on the Harter Act in a suit for damage to cargo, and that "the learned District Judge has since considered the act many times, and has adopted a much severer standard of diligence than that applied in this case, and has required far more stringent evidence thereof."

The cases referred to do not justify this state-

ment. All except the *Colima*, 82 Fed., 665, were cases in which the Court found as a fact that the vessels were *structurally defective*, and that the shipowner had not used due diligence in providing, as the vehicle of carriage, a reasonably fit vessel. There was no question in those cases of faults in management. The defects were structural. The faults were in respect of matters to which a diligent owner ordinarily gives attention in person or by his shore superintendents. The damages arose from those personal faults, notwithstanding proper "management."

The *Colima*, in as far as it involved the Harter Act, was a case of improper loading, of faulty distribution of weights in a vessel of tender model. She could not be relieved by the Harter Act from the consequen es of the disaster which overtook her, because the negligence in *stowage* was a matter for which the owner, under the 1st section of the statute, remained liable.

There is not the slightest reason for supposing that Judge Brown has changed in any way the views he expressed in his decision of the present case. On the contrary, in one of the most recent of his deci ions under the statute (*Botany Worsted Mills* v. *Knott*, 76 Fed., 582, 584, decided in October, 1896), he refers to his decision in this case as follows:

"The handling of the ship's appliances, with reference to the navigation or the safety of the ship for the purposes of the voyage, belong to the 'management of the ship.' Thus, in the *Silvia*, 64 Fed., 607, where the officers had neglected to close the iron shutters of a port hole, in consequence of which, in rough weather, sea water came in and damaged the cargo, it was held by this Court that the neglect arose in the 'management of the vessel,' was covered by the Harter Act, even though from the inaccessibility of the open port, as considered by this Court, the open port amounted to unseaworthiness; because the neglect consisted in not making use of the things supplied by the owner to put and keep the ship herself in a proper condition to meet stormy weather."

(**6**.) If, then, the proper test be to regard the quality of the negligent act rather than the time when it was com-

mitted; and if the intent of the act is to "relieve the shipowner from his previous warranty of absolute seaworthiness in fact" (82 Fed., 678), the real inquiry will be: Was the proper closing of the ports an act belonging to the management or navigation of the ship? That question it would seem, both on reason and on authority, should be answered in the affirmative. If it is so answered, then the ship is exempted, whether the fault in the management occurred prior to sailing (The *Carron Park*, 15 P. D., 203; *Carmichael* v. *Liverpool*, &c., 192 Q. B. D., 242; The *Silvia*, 64 Fed., 607; The *Warkworth*, 9 P. D., 20; do., 145) The *Southgate* (1893], Prob., 329), during the passage (The *Mexican Prince*, 82 Fed., 484; *The Sandfield*, 79 Fed., 371), or whilst unloading at the port of destination (The *Glenochil* [1896], Prob., 10; The *Castleventry*, 69 Fed., 475, *note*).

(7.) This construction is in accordance with the rule prevailing with regard to exceptions in bills of lading or charter parties which, by their terms, are sufficiently specific to relate to causes of damage occurring even before sailing, or where they import a modification of the implied warranty of seaworthiness formerly prevailing. (Baerselmen *v.* Bailey [1895], 2 Q. B., 301, 304).

Carver, Carriage by Sea, S. 58, states this rule as follows:

"When, however, a bill of lading has been given and taken, its provisions must be considered to relate back, and apply to what has been done in regard to the shipment before it was given It is to be taken as the expression of the contract under which everything has been done. Thus, the exceptions of risks contained in it apply to the stowage of the goods, although that may have been completed before the bill of lading was given (citing the *Duero*, L. R., 2 A. & E., 393; *Pyman* v. *Burt*, 1 Cab. & E., 207; *Norman* v. *Binnington*, 25 Q. B. D., 475, 478; *Nottebohn* v. *Richter*, 18 Q. B. D., 63)."

Other authorities holding to this effect are The *Carron Park*, 15 P. D., 203; *Scott* v. *Baltimore Steamboat Co.*, 19 Fed., 56; *Rubens* v. *Ludgate Hill S. S. Co.*, 20 N. Y. Supplement, 481; affirmed, 143 N. Y., 629; The *Carib Prince*, 63 Fed., 266; 35 U. S. App., 390; *Cargo Ex.*

Laertes, 12 Prob. Div., 187; The *Southgate* [1893], Prob., 329; *Pollock on Bills of Lading*, 39.

VI.

The libelant is not in privity with the charter-party between the owner and J. H. Winchester & Co.

The effort is made in the appellant's brief (p. 29) to show that, by a warranty of seaworthiness in a charter-party between the Red Cross Line, owners of the *Silvia*, and J. H. Winchester & Co., the claimant has precluded itself from any exemption under the Harter Act. It is contended by the claimant that the ship *was* seaworthy; but this point may be briefly noticed.

It is not shown in the evidence that the American Sugar Refining Company, consignee in the bill of lading, or the Franklin Sugar Refining Company, its assignee, were in any privity with this charter-party. It is not known for whom Winchester & Co. acted in effecting it, whether it was a speculation on the freight markets, or whether Winchester relet the vessel's freight space, or whether she was chartered for some unknown people who put her up as a general ship, nor does it appear whether the sugar belonged to the sugar refining company at the time of shipment, or whether it bought the cargo and took an assignment of the bill of lading. The facts are that the master issued a bill of lading in due form, reciting shipment of the cargo by Dubois & Co., providing for its delivery at Philadelphia unto the order of the American Sugar Refining Company or its assigns, he or they paying freight for the said sugar at the rate of (12c.) twelve cents U. S. currency per every one hundred pounds net invoice weight and all other conditions as per charter party. Dated New York, 31st January, 1891."

It has been repeatedly decided that a bill of lading in this form does not incorporate the exceptions or conditions of a charter-party, except such as are *ejusdem generis*

with the freight obligation (*Russell* v. *Niemann*, 17 C. B., U. S., 163; *Serraino* v. *Campbell* [1891], 1 Q. B., 283; *Taylor* v. *Perrin* [H. of L.], quoted by Lord Lopes in *Serraino* v. *Campbell* (*supra*), at p. 294).

If this clause of reference in a bill of lading will not bring in the exemptions of the charter party for the ship-owner's benefit, it could hardly incorporate a warranty, which might be for the cargo owner's benefit.

Further discussion of this point, however, is unnecessary, since, in the libel, libelant distinctly declared upon the bill of lading, alleging it was issued to the shipper by the master, and contained the agreement for the carriage and delivery of the cargo upon the terms therein stated (*Record*, p. 1). It was further alleged (p. 2) that the libelant had purchased the sugar in reliance upon the recitals of the bill of lading, that "the said bill of lading was duly assigned to the libelant, which became the owner of said cargo, and entitled to bring this suit."

No reference was made in the libel to the charter-party, nor to any other shipping document.

In these circumstances, libelant's rights are to be determined under the bill of lading (*Iron Mountain Railway* v. *Knight*, 122 U. S., 79; 92; *N. J. S. T. Nav. Co.* v. *Merchants Bank*, 6 Howard, 344.

Last Point.

The decree should be affirmed, with costs.

Dated New York, March 5, 1898.

Respectfully submitted,

CONVERS & KIRLIN,
Proctors for Appellee.

J. PARKER KIRLIN,
Advocate.

[2376R]

APPENDIX.

HARTER ACT.

(NOTE.—Italics indicate parts changed by amendments in the passage of the bill.)

H. R. 9176.

A BILL relating to contracts of common carriers and to certain obligations, duties and rights in connection with the carriage of property.

Be it enacted, etc., That it shall not be lawful for *any common carrier* or the manager, agent, master or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care in transport, or proper delivery of any and all lawful merchandise or property committed to its or their charge, *nor shall it be lawful to limit its or their liability to less than a full indemnity to the legal claimant for any loss or damage therefrom, and* any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.

SEC. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel *to* properly equip, man, provision, and outfit said vessel, and make said vessel seaworthy and capable of performing her intended voyage, or *any covenant or agreement* whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and

[PUBLIC—No. 57.]

AN ACT relating to navigation of vessels, bills of lading, and to certain obligations, duties, and rights in connection with the carriage of property.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it shall not be lawful for the manager, agent, master or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.

SEC. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent or manager to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel *to exercise due diligence* [to] properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents or servants to carefully handle and stow her cargo and to care for and properly

properly deliver same, shall in any wise be lessened, weakened or avoided.

SEC. 3. That if any vessel transporting merchandise or property *between* ports in the United States of America *and foreign ports* shall, *on starting on her voyage, be* in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent *or master* shall become or be held responsible for damage or loss resulting from *error of judgment* in navigation or in the management of said vessel, *if navigated with ordinary skill and care, from the time of her leaving her usual place of loading on her intended voyage until her arrival at the usual place of discharge at her port of delivery*, nor shall the owner or owners, *the vessel*, or master be held liable for losses arising from dangers of the sea, acts of God, or public enemies, *or in saving life, and it may be stipulated in bills of lading and shipping receipts that the vessel may render services to property in distress afloat and tow same to the nearest and most convenient port of safety without incurring penalties from deviation in rendering such service.*

SEC. 4. *That it shall be the duty of the owner or owners, agent, manager, or other authorized person to issue to shippers of any lawful merchandise a bill of lading or shipping document stating the marks, packages, or quantity and apparent condition of such merchandise or property delivered to and received by the owner, master, or agent of the vessel for transportation, and the voyage, or ports at which such vessel is intended to touch, and such document shall be evidence of the responsibility of the vessel for the merchandise therein described.*

SEC. 5. *That it shall be the duty of the collector of the port in which the vessel is lying to refuse clearance to a vessel from said port if he is informed and is satisfied that the owner, master, agent, commercial carrier, or*

deliver same, shall in any wise be lessened, weakened or avoided.

SEC. 3. That if *the owner* of any vessel transporting merchandise or property *to or from any port* in the United States of America shall *exercise due diligence to make the said vessel* in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, *or charterers* shall become or be held responsible for damage or loss resulting from *faults or errors* in navigation or in the management of said vessel nor shall the *vessel*, her owner or owners, charterers, *agent*, or master be held liable for losses arising from dangers of the sea *or other navigable waters*, acts of God, or public enemies, *or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service.*

SEC. 4. *That it shall be the duty of the owner or owners, masters or agent of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to issue to shippers of any lawful merchandise a bill of lading, or shipping document, stating, among other things, the marks necessary for identification, number of packages, or quantity, stating whether it be carrier's or shipper's weight, and apparent order or condition of such merchandise or property delivered to and received by the owner, master, or agent of the vessel for transportation, and such document shall be prima facie evidence of the receipt of the merchandise therein described.*

SEC. 5. *That for a violation of any of the provisions of this act the agent, owner, or master of the vessel guilty of such violation, and who refuses to issue on demand the bill of lading herein provided for, shall be*

other person representing such vessel, has issued bills of lading for merchandise or property containing clauses that are declared not lawful by section 1 or section 2 of this act, or if he is informed and is satisfied that the owner, agent, master, or other person representing such vessel, will not issue bills of lading, as required by section 4 of this act, for merchandise or property delivered to and received by the vessel for transportation; and the said collector shall withhold clearance papers to said vessel until bills of lading or shipping documents are issued to conform to the said first, second, and fourth sections of this act, or if documents have been previously issued, until they are modified to conform to the requirements of said sections.

SEC. 6. That this act shall not be held to modify or repeal Sections 4281, 4282, and 4283 of the Revised Statutes of the United States.

SEC. 7. That this act shall take effect from and after the 1st day of *September, 1892.*

(Passed the House, amended to read as above, December 16, 1892. 24 Cong. Rec., pp. 147-149, 169.)

liable to a fine not exceeding two thousand dollars. The amount of the fine and costs for such violation shall be a lien upon the vessel, whose agent, owner, or master is guilty of such violation, and such vessel may be libeled therefor in any district court of the United States, within whose jurisdiction the vessel may be found. One-half of such penalty shall go to the party injured by such violation and the remainder to the Government of the United States.

SEC. 6. That this act shall not be held to modify or repeal sections forty-two hundred and eighty-one, forty-two hundred and eighty-two, and forty-two hundred and eighty-three of the Revised Statutes of the United States, *or any other statute defining the liability of vessels, their owners, or representatives.*

SEC. 7. *Sections one and four of this act shall not apply to the transportation of live animals.*

SEC. 8. That this act shall take effect from and after the first day of *July,* eighteen hundred and *ninety-three.*

Passed the Senate as amended February, 1893, 24 Cong. Rec., 1275. Senate amendments concurred in February 8th, 1893. 24 Cong. Rec., 1342.

Approved, February 13, 1893.

[2 Supp. R. S., p. 81.]

No. 79.

Brief of Wheeler in support of decree below - by leave

Supreme Court of the United States,

OCTOBER TERM, 1897.

Filed Mar. 7, 1898.

THE FRANKLIN SUGAR REFINING CO.,
Appellant,

vs.

THE STEAMSHIP "SILVIA," RED CROSS LINE,
Appellee.

No. 79.

Supplemental Brief submitted by leave of the Court in support of the decree below.

First.

This case, as well as the *Carib Prince* and *Calderon* against the Atlas S. S. Co., involve the construction of the Harter Act.

The following is a reprint of that Act, as it passed the House of Representatives, and as it finally became a law. The portions stricken out in the Senate, are printed in italics in the reprint of the House bill. The portions added in the Senate are printed in italics in the reprint of the bill as it finally passed.

52d Congress,
2d Session.

H. R. 9176.

IN THE SENATE OF THE UNITED STATES.

December 20, 1892.

Read twice and referred to the Committee on Commerce.

(Portions stricken out in Senate are printed in italics.)

AN ACT

Relating to contracts of common carriers and to certain obligations, duties, and rights in connection with the carriage of property.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it shall not be lawful for *any common carrier or* the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care *in transport*, or proper delivery of any and all lawful merchandise or property committed to its or their charge, *nor shall it be lawful to limit its or their liability to less than a full indemnity to the legal claimant for any loss or damage therefrom, and* any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.

SEC. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel to properly equip, man, provision, and outfit said vessel, and make said vessel seaworthy and capable of perform-

27 Stat. at Large, 445; 24 Cong. Record, Part 2, pp. 1180, 1291.

(Portions added in Senate are printed in italics.)

HARTER ACT, FEBRUARY 13, 1893.

AN ACT relating to navigation of vessels, bills of lading, and to certain obligations, duties, and rights in connection with the carriage of property.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.

SEC. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel *to exercise due diligence*, properly equip, man, provision, and outfit said vessel, and *to* make said vessel seaworthy

ing her intended voyage, or *any covenant or agreement* whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in anywise be lessened, weakened or avoided.

SEC. 3. That if any vessel transporting merchandise or property *between ports* in the United States of America *and foreign ports* shall, on starting on her voyage, be in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, *or master* shall become or be held responsible for damage or loss resulting from *error of judgment* in navigation or in the management of said vessel, *if navigated with ordinary skill and care, from the time of her leaving her usual place of loading on her intended voyage until her arrival at the usual place of discharge at her port of delivery*, nor shall the owner or owners, the vessel, or master be held liable for losses arising from dangers of the sea, acts of God, or public enemies, *or in saving life, and it may be stipulated in bills of lading and shipping receipts that the vessel may render services to property in distress afloat and tow same to the nearest and most convenient port of safety without incurring penalties from deviation in rendering such service.*

SEC. 4. *That it shall be the duty of the owner or owners, agent, manager or other authorized person to issue to shippers of any lawful merchandise a bill of lading or shipping document stating the marks, packages or quantity and apparent condition of such merchandise or property delivered to and received by the owner, master or agent of the vessel for transportation, and the voyage, or ports at which such vessel is intended to touch, and such document shall be evidence of the responsibility of the vessel for the merchandise therein described.*

SEC. 5. *That it shall be the duty of the collector of the port in which the vessel is lying to refuse clearance to a vessel from said port if he is informed and is satisfied that the owner, master, agent, connecting carrier or other*

and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened, or avoided.

SEC. 3. That if *the owner of* any vessel transporting merchandise or property *to or from any port* in the United States of America shall *exercise due diligence to make the said vessel* in all respects seaworthy and properly manned, equipped and supplied, neither the vessel, her owner or owners, agent, *or charterers* shall become or be held responsible for damage or loss resulting from *faults or errors* in navigation or in the management of said vessel, nor shall the *vessel, her* owner or owners, *charterers, agent,* or master be held liable for losses arising from dangers of the sea, *or other navigable waters,* acts of God, or public enemies, *or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such services.*

SEC. 4. *That it shall be the duty of the owner or owners, masters or agent of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to issue to shippers of any lawful merchandise a bill of lading, or shipping document, stating, among other things, the marks necessary for identification, number of packages, or quantity, stating whether it be carrier's or shipper's weight, and apparent order or condition of such merchandise or property delivered to and received by the owner, master, or agent of the vessel for transportation, and such document shall be prima facie evidence of the receipt of the merchandise therein described.*

SEC. 5. *That for a violation of any of the provisions of this act the agent, owner, or master of the vessel guilty of such violation, and who refuses to issue on demand the bill of lading herein provided for, shall be liable to a fine*

person representing such vessel has issued bills of lading for merchandise or property containing clauses that are declared not lawful by section one or section two of this act, or if he is informed and is satisfied that the owner, agent, master or other person representing such vessel will not issue bills of lading, as required by section four of this act, for merchandise or property delivered to and received by the vessel for transportation; and the said collector shall withhold clearance papers to said vessel until bills of lading or shipping documents are issued to conform to the said first, second and fourth sections of this act, or, if documents have been previously issued, until they are modified to conform to the requirements of said sections.

SEC. 6. That this act shall not be held to modify or repeal sections forty-two hundred and eighty-one, forty-two hundred and eighty-two and forty-two hundred and eighty-three of the Revised Statutes of the United States.

SEC. 7. That this act shall take effect from and after the first day of *September*, eighteen hundred and *ninety-two*.

Passed the House of Representatives December 15, 1892.

Attest: JAMES KERR,
Clerk.

not exceeding two thousand dollars. The amount of the fine and costs for such violation shall be a lien upon the vessel, whose agent, owner, or master is guilty of such violation, and such vessel may be libeled thereafter in any district court of the United States, within whose jurisdiction the vessel may be found. One-half of such penalty shall go to the party injured by such violation and the remainder to the Government of the United States.

SEC. 6. That this act shall not be held to modify or repeal sections forty-two hundred and eighty-one, forty-two hundred and eighty-two, and forty-two hundred and eighty-three of the Revised Statutes of the United States, *or any other statute defining the liability of vessels, their owners, or representatives.*

SEC. 7. *Sections one and four of this act shall not apply to the transportation of live animals.*

SEC. 8. That this act shall take effect from and after the first day of July, eighteen hundred and ninety-three.

Approved, February 13, 1893.

Second.

Much light is thrown on the intention of Congress by this examination of what it refused to do. From this it appears that after very full consideration Congress refused to enact the following propositions:

1. "Nor shall it be lawful to limit its or their liability (that of the carrier) to less than a full indemnity to the legal claimant for any loss or damage" from negligence.

2. That the condition of exemption from liability for damage or loss resulting from error in judgment in navigation or in the management of the vessel should be—

a. Her seaworthiness at the outset.

b. Her being navigated with ordinary skill and care.

Not only did Congress refuse to enact these propositions which were contained in the bill as it came from the House, but it did finally enact that if the owner should exercise due diligence to make the vessel in all respects seaworthy and properly manned, equipped and supplied, the vessel and her owner should not be liable, for faults or errors in navigation or in the management of the vessel.

Neither the House bill, nor the bill as finally passed prohibited the insertion in bills of lading of clauses excluding liability for latent defects. Indeed such clauses were never invalid by the maritime law of this country if due diligence were used to discover such defects, and guard against them.

Thus it is plain that a bill was passed, at the end of a controversy that had been going on for many years, and with the purpose of settling the questions in difference between carriers, shippers and underwriters. All were satisfied with the bill as it was amended in the Senate and passed by both Houses of Congress. Is not the in-

ference inevitable that it settled the controversy and adjusted the rights of all parties in an equitable manner? How then can the shipper or the underwriter justly insist upon an absolute warranty of seaworthiness not expressed in the bill of lading, and which is inconsistent with the positive requirements of the act? How can it be contended that the carrier remains liable for a latent defect, not discoverable by due diligence, when he is not liable for actual negligence of the mariniers, provided due diligence has been used "to make the vessel seaworthy and properly manned, equipped and supplied"?

Third.

No claim is made in the appellant's brief that the Harter Act does not apply to foreign vessels. That it does is in effect conceded, and was held in the Courts below (Record, pp. 49, 55). For this reason no elaborate argument is presented on that subject. In view of the general words of that Act, and of the language of this Court in

The Scotland, 105 U. S., 24,

the point would seem to be clear. In that case the Court, after referring to a few cases where the Courts of one country would administer the law of another, adds (pp. 30, 31):

"In all other cases, each nation will also administer justice according to its own laws. And it will do this without respect of persons, to the stranger, as well as to the citizen. If it be the legislative will that any particular privilege should be enjoyed by its own citizens alone, express provision will be made to that effect.

Some laws, it is true, are necessarily special in their application to domestic ships, such as those relating to the forms of ownership, charter party, and nationality; others follow the vessel wherever she goes, as the law of the flag, such as those which regulate the mutual relations of master and crew, and the power of the master to bind the ship or her owners. But the great mass of the laws are, or are intended to be, expressive of the rules of justice and right applicable alike to all. * * *

"But it is enough to say, that the rule of limited responsibility is now our maritime rule. It is the rule by which, through the act of Congress, we have announced that we propose to administer justice in maritime cases. We see no reason, in the absence of any different law governing the case, why it should not be applied to foreign ships as well as to our own, whenever the parties choose to resort to our Courts for redress. Of course the rule must be applied, if applied at all, as well when it operates against foreign ships as when it operates in their favor."

Fourth.

The decree of the Court below should be affirmed with costs.

EVERETT P. WHEELER,
Of Counsel for Atlas Steamship Co.

171 462
173 551

171 462
L-ed 241
191 f 680
92 f 666
194 f 677
194 f 680

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L-ed 241
98 f 637
d98 f 638
98 f 639
98 f 640
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171 462
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104 f 151
104 f 152
104 f 154
104 f 155

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181 222
181 224
106 f 328
106 f 976

171 462
43 L-ed 241
d116 f 66

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43 L-ed 241
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117 f 286

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e110 f 424

THE SILVIA.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 5. Argued March 8, 1898 — Decided October 17, 1898.

A ship, whose port holes between decks are fitted with the usual glass covers and the usual iron shutters, and have no cargo stowed against them, is not unseaworthy by reason of beginning a voyage in fair weather with the glass covers tightly closed, and the iron shutters left open for the admission of light, but capable of being speedily got at and closed if occasion should require; and any subsequent neglect in not closing the iron covers is a "fault or error in navigation or in the management

of the vessel," within the meaning of section 3 of the act of Congress of February 13, 1893, c. 105, known as the Harter Act.
Section 3 of the Harter Act applies to foreign vessels.

THE case is stated in the opinion.

Mr. Charles C. Burlingham and *Mr. Harrington Putnam* for the Franklin Sugar Refining Company.

Mr. J. Parker Kirlin for the Silvia.

MR. JUSTICE GRAY delivered the opinion of the court.

This was a libel in admiralty, filed June 14, 1894, in the District Court of the United States for the Southern District of New York, by the Franklin Sugar Refining Company, a corporation organized under the laws of the State of Pennsylvania, against the steamship Silvia, of Liverpool, owned by the Red Cross Line of Steamers, to recover damages for injuries to a cargo of sugar, owned by the libellant, which had been shipped on or about February 15, 1894, upon the Silvia at Matanzas, Cuba, for Philadelphia, under a bill of lading, by which the sugar was "to be delivered in the like good order and condition at the port of Philadelphia (the dangers of the seas only excepted)," upon payment of agreed freight, "and all other conditions as per charter party dated New York 31st January, 1894."

The charter party, which had been made and concluded at New York January 31, 1894, provided that the Silvia, then at Tucacas, Venezuela, should proceed as soon as possible in ballast to Matanzas for a voyage thence to Philadelphia, New York or Boston; and contained these provisions: "The vessel shall be tight, staunch, strong and in every way fitted for such a voyage, and receive on board, during the aforesaid voyage, the merchandise hereinafter mentioned (the act of God, adverse winds, restraint of princes and rulers, the Queen's enemies, fire, pirates, accidents to machinery or boilers, collisions, errors of navigation and all other dangers and accidents of the seas, rivers and navigation, of whatever nature and kind soever during the said voyage al-

ways excepted). The said party of the second part doth engage to provide and furnish to the said vessel a full cargo, under deck, of sugar in bags. The bills of lading to be signed without prejudice to this charter."

The Silvia, with the sugar in her lower hold, sailed from Matanzas for Philadelphia on the morning of February 16, 1894. The compartment between decks next the forecastle had been fitted up to carry steerage passengers, but on this voyage contained only spare sails and ropes, and a small quantity of stores. This compartment had four round ports on each side, which were about eight or nine feet above the water line when the vessel was deep laden. Each port was eight inches in diameter, furnished with a cover of glass five eighths of an inch thick, set in a brass frame, as well as with an inner cover or dummy of iron. When the ship sailed, the weather was fair, and the glass covers were tightly closed, but the iron covers were left open in order to light the compartment should it become necessary to get anything from it, and the hatches were battened down, but could have been opened in two minutes by knocking out the wedges. In the afternoon of the day of sailing, the ship encountered rough weather, and the glass cover of one of the ports was broken — whether by the force of the seas or by floating timber or wreckage, was wholly a matter of conjecture — and the water came in through the port, and damaged the sugar.

The decree of the District Court dismissed the libel, and was affirmed by the Circuit Court of Appeals. 64 Fed. Rep. 607; 35 U. S. App. 395. The libellant applied for and obtained a writ of certiorari from this court.

It was adjudged by this court at the last term that the act of Congress of February 13, 1893, c. 105, known as the Harter Act, has not released the owner of a ship from the duty of making her seaworthy at the beginning of her voyage. *The Carib Prince*, 170 U. S. 655.

But the contention that the Silvia was unseaworthy when she sailed from Matanzas is unsupported by the facts. The test of seaworthiness is whether the vessel is reasonably fit to carry the cargo which she has undertaken to transport.

The port holes of the compartment in question were furnished both with the usual glass covers and with the usual iron shutters or deadlights; and there is nothing in the case to justify an inference that there was any defect in the construction of either. When she began her voyage, the weather being fair, the glass covers only were shut, and the iron ones were left open for the purpose of lighting the compartment. Although the hatches were battened down, they could have been taken off in two minutes, and no cargo was stowed against the ports so as to prevent or embarrass access to them in case a change of weather should make it necessary or proper to close the iron shutters. Had the cargo been so stowed as to require much time and labor to shift or remove it in order to get at the ports, the fact that the iron shutters were left open at the beginning of the voyage might have rendered the ship unseaworthy. But as no cargo was so stowed, and the ports were in a place where these shutters would usually be left open for the admission of light, and could be speedily got at and closed if occasion should require, there is no ground for holding that the ship was unseaworthy at the time of sailing. *Steel* v. *State Line Steamship Co.*, 3 App. Cas. 72, 82, 90, 91; *Hedley* v. *Pinkney Steamship Co.*, (1892) 1 Q. B. 58, 65, and (1894) App. Cas. 222, 227, 228; *Gilroy* v. *Price*, (1893) App. Cas. 56, 64.

The third section of the Harter Act provides that "if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped and supplied, neither the vessel, her owner or owners, agent or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel." 27 Stat. 445.

This provision, in its terms and intent, includes foreign vessels carrying goods to or from a port of the United States. *The Scotland*, 105 U. S. 24, 30; *The Carib Prince*, above cited.

Not only had the owners of the Silvia exercised due diligence to make her seaworthy, but, as has been seen, she was actually seaworthy when she began her voyage.

Syllabus.

This case does not require a comprehensive definition of the words "navigation" and "management" of a vessel, within the meaning of the act of Congress. They might not include stowage of cargo, not affecting the fitness of the ship to carry her cargo. But they do include, at the least, the control, during the voyage, of everything with which the vessel is equipped for the purpose of protecting her and her cargo against the inroad of the seas; and if there was any neglect in not closing the iron covers of the ports, it was a fault or error in the navigation or in the management of the ship. This view accords with the result of the English decisions upon the meaning of these words. *Good* v. *London Steamship Owners' Association*, L. R. 6 C. P. 563; *The Warkworth*, 9 Prob. Div. 20, 145; *Carmichael* v. *Liverpool Shipowners' Association*, 19 Q. B. D. 242; *Canada Shipping Co.* v. *British Shipowners' Association*, 23 Q. B. D. 342; *The Ferro*, (1893) Prob. 38; *The Glenochil*, (1896) Prob. 10.

In the case, cited by the appellant, of *Dobell* v. *Steamship Rossmore Co.*, (1895) 2 Q. B. 408, 414, the ship was unseaworthy at the time of sailing, by reason of the cargo having been so stowed against an open port that the port could not be closed without removing a considerable part of the cargo; and Lord Esher, M.R., upon that ground, distinguished that case from the decision of the Circuit Court of Appeals in the present case.

Judgment affirmed.